# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1906.**

## No. 144.

BERTON O. WETMORE, ADMINISTRATOR OF THE ESTATE OF CHARLES H. WETMORE, DECEASED, TO THE USE OF JOHN F. McKAY, PLAINTIFF IN ERROR,

*vs.*

JAMES L. KARRICK.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

**FILED NOVEMBER 3, 1905.**

**(19,952.)**

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# In the Court of Appeals of the District of Columbia.

BERTON O. WETMORE, Administrator, &c., Appellant,
*vs.*
JAMES L. KARRICK.
No. 1601.

*a* Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff,
*vs.*
JAMES L. KARRICK, Defendant.
At Law. No. 46600.

UNITED STATES OF AMERICA,
*District of Columbia.* } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause to wit:—

1 *Declaration and Affidavit.*

Filed Dec. 1, 1903.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff,
*vs.*
JAMES L. KARRICK, Defendant.
At Law. No. 46600.

Berton O. Wetmore, as administrator of the estate of Charles H. Wetmore, deceased, having duly qualified as such administrator in the probate court of Suffolk county, in the State of Massachusetts and to whom letters of administration as such administrator were duly issued by the said probate court of Suffolk county, Massachusetts, a duly authenticated copy of which said letters of administration under the seal of the said probate court are now brought here in court and filed herewith, to the use of John F. McKay, plaintiff,

sues the defendant James L. Karrick, for that the plaintiff's intestate the said Charles H. Wetmore, in the superior court within and for the county of Suffolk, in the State of Massachusetts, held at Boston, Massachusetts, on the twentieth day of November A. D. 1900, being a court of record of said State duly held and having jurisdiction in that behalf, by the consideration and judgment of said court, recovered against the said defendant, a judgment for the sum of twelve thousand eight hundred and eighty one dollars and forty-six cents, and also the sum of forty dollars and forty-six cents costs, whereof the said defendant was convicted, as appears by a copy of the record of said superior court for Suffolk county, duly certified, annexed hereto and marked Exhibit A, and made a part hereof; which judgment remains of full force, and is not annulled, reversed, or satisfied, and upon which the plaintiff has not obtained any execution or satisfaction. Yet the said defendant though often requested thereto, has not paid the said sum or any part thereof to the plaintiff, but the same remains due and wholly unpaid. And the plaintiff as administrator aforesaid claims of the said defendant the sum of twelve thousand nine hundred and twenty-one dollars and ninety-two cents, with interest at the rate of six per centum per annum from November 20, A. D. 1900, until paid, besides costs.

WM. L. FORD,
*Plaintiff's Attorney.*

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WM. L. FORD,
*Plaintiff's Attorney.*

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff,
*vs.*
JAMES L. KARRICK Defendant.
} At Law. No. 46600.

STATE OF MASSACHUSETTS, *County of Suffolk,* } *ss*:

John F. McKay, being first duly sworn makes oath that he is the use or beneficial plaintiff named in the foregoing declaration and that Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, is the nominal plaintiff therein, and that the plaintiff has a good cause of action against the defendant
2 James L. Karrick named in said declaration which said declaration and the exhibit referred to therein are made a

part hereof; that the cause of the plaintiff's action against the defendant is a judgment obtained by the said Charles H. Wetmore, in the superior court within and for the county of Suffolk, in the State of Massachusetts, the same being a court of record, on the 20th day of November A. D. 1900, for the sum of $12,881.46 and $40.46 costs, which bears interest at the rate of six per centum per annum from said date until paid, and which said sums amounting to $12,921.92, with interest as aforesaid, are due the plaintiff by the said defendant in full and exclusive of all set-offs and just grounds of defense; that said judgment has not been paid off or satisfied in any manner whatever, and that the plaintiff has a just right to recover from the defendant the total amount of said judgment and costs and interest as claimed in the annexed declaration; that the affiant is the assignee for a valuable consideration of the original cause of action on which said judgment is founded, and that the original suit in the superior court of Suffolk county, Massachusetts, as set out in the exhibit before mentioned, was brought for his use and benefit, and that he is now the beneficial owner of said judgment, and that the affiant has personal knowledge of the facts herein stated and the claim as set forth in said declaration and this affidavit; and that the defendant in said declaration is *bona fide* indebted to the plaintiff over and above all discounts as herein stated.

JOHN F. McKAY.

Subscribed and sworn to before me this 20″ day of November A. D. 1903.

EDWARD B. COFFIN,
*Notary Public.*

[NOTARIAL SEAL.]

EXHIBIT A.

Filed Dec. 1, 1903.

COMMONWEALTH OF MASSACHUSETTS:

I, Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts,

Do certify, that Jos. A. Willard Esq. whose signature is affixed to the papers hereunto annexed, is clerk of said superior court, within and for the county of Suffolk, and hath the keeping of the files, records, and proceedings of said court, within and for said county; also of the late court of common pleas, within and for said county, and of the late superior court of the county of Suffolk, aforesaid; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said several courts; that full faith and credit are and ought to be given to his
3 acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1 to 45

inclusive of the files, records and proceedings of the said superior court is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be hereunto affixed, this second day of February in the year of our Lord one thousand nine hundred one.

[COURT SEAL.] ALBERT MASON,
*Chief Justice of the Superior Court.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our superior court for the said county of Suffolk, it is thus contained, the following being the entire record in the case.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To the sheriffs of our several counties or their deputies, Greeting:

[SEAL.] We command you to attach the goods or estate of James L. Karrick of Boston in the county and Commonwealth aforesaid to the value of twenty thousand dollars and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court, to be holden at Boston, within and for our said county of Suffolk, on the first Monday of October next, then and there in our said court to answer unto Charles H. Wetmore of said Boston in the county and Commonwealth aforesaid, in an action of contract.

First count. And the plaintiff says that on February 11th, 1892, he was the owner of land on corner of Dudley and Greenville streets, Boston, upon which he was erecting three apartment houses; that at said time the defendant was the assignee and owner of a third mortgage upon said property for seventy thousand dollars, which said mortgage was given by plaintiff to one A. J. West, in connection with an agreement by said West that he would advance plaintiff thirty thousand dollars to enable him to erect three apartment houses upon said land, which said agreement was assigned by said West to defendant; that on the 11th day of February 1892, the defendant made a contract in writing with the plaintiff of which a copy is hereto annexed, marked "A"; that the defendant knew at the time of making said contract that the plaintiff was building said houses on said land, and the defendant also knew at the time that plaintiff had no money of his own which he could use in the completion of said buildings, and that he, plaintiff, could not obtain sufficient credit to finish them: and that he, defendant, had all of plaintiff's property within his control, and

that plaintiff had no other property upon which he could borrow sufficient money to complete said buildings. And said agreement "A" was made with the above knowledge on the defendant's part, and for the purpose of enabling the plaintiff to complete said buildings. And the defendant knew that a failure on his part to keep agreement "A" would prevent the plaintiff from performing and keeping the conditions and agreements called for by the mortgage upon said land and buildings, and would cause a technical and literal breach of the agreement and conditions on the part of the plaintiff. And defendant was secured upon said agreement "A" by virtue of the fact that he had acquired the West mortgage, and had a right to apply the amounts which he might advance, under the agreement "A" to said West mortgage so that said advances would have been secured under said West mortgage, and also by personal property of the plaintiff within the control of the defendant.

And the plaintiff says the defendant failed to make said advances which he agreed to make in said contract "A," and broke and failed to carry out said contract, although the plaintiff was ready and willing to keep his part of the same, and did keep it, and that in consequence of said failure and breach by the defendant, the plaintiff was unable to get any income from said property which would enable him to meet the interest and other charges on said mortgages on said property when they became due, and was unable to obtain money from any source to meet the said charges and interest which might become due on said mortgages and was unable to complete said buildings. And the defendant, well knowing all the foregoing facts, failed to make the advances called for in said contract "A" and entered and took possession under said Wetmore-West mortgage and foreclosed the same, and the plaintiff thereby, in consequence of defendant's breach of the said contract "A" lost said property and the large profits which he would have made on said property and houses had the defendant kept said contract "A," all to his damage.

Second count. And the plaintiff says that on February 11th, 1892, he was the owner of a lot of land on the corner of Dudley and Greenville streets Boston, and was building on the same three apartment houses: that at the said time the defendant was the assignee and owner of a third mortgage on said property, given by plaintiff to one A. J. West, who formerly owned the property: that there was an agreement between West and plaintiff which said agreement is annexed marked "E," by which West agreed to advance the plaintiff thirty thousand dollars ($30,000) to enable the plaintiff to erect three apartment houses upon said land, and that the defendant assumed the obligations of said West in the premises under said mortgage and agreement between West and the plaintiff: that the plaintiff was having large amounts of material to be used in the construction of said buildings coming from outside and distant places: and the defendant agreed with the plaintiff that if the plaintiff would give the defendant a

mortgage for four thousand dollars upon certain personal property, then owned by the plaintiff, a copy of which said mortgage is hereto annexed marked "B," the defendant would pay all freight charges and charges of transportation which might become due upon materials to be used in the construction of said buildings, and deliver the same on the premises: that the defendant knew at the time of making of said contract that the plaintiff was building said houses on said land, and the defendant also knew at the time that the plaintiff had no money of his own which he could use in the completion of said buildings, and that the plaintiff could not obtain sufficient credit to finish them, and that the defendant had all plaintiff's property within his control, and that the plaintiff had no other property upon which he could borrow sufficient money to complete said buildings, and said agreement "A" was made with the above knowledge on the defendant's part, and for the purpose of enabling the plaintiff to complete said buildings. And the plaintiff says the defendant failed to make any of said payments when called for or any of said deliveries, although often requested so to do by the plaintiff, and broke and failed to carry out said agreement for which said mortgage was given, although the plaintiff was ready and willing to keep his part of the same and did keep it. And that, in consequence of the defendant's failure and breach, the plaintiff was unable to get necessary material or money to enable plaintiff to complete the construction of said buildings: was unable to get any income from said property which would enable him to meet the interest and other charges on said Wetmore-West mortgage on said land and buildings, and was unable to obtain any money from any source to meet interest and charges which might become due on said mortgage. And the defendant well knowing the foregoing facts, entered and took possession, under said Wetmore-West mortgage, and foreclosed the same and the plaintiff thereby, in consequence of defendant's breach of the contract made at the time of giving mortgage "B" lost all of said land and buildings and the large profits he would have made had the defendant kept the said contracts of February 11th 1892, all to his damage.

Third count. And the plaintiff says the defendant made a promissory note, payable to plaintiff, a copy whereof is hereto annexed marked "C." And the defendant owes the plaintiff the amount of said note and interest thereof.

Copy.

"C." BOSTON, 11*th February*, 1892.

Three months after date, I promise to pay Charles H. Wetmore, four thousand dollars. Payable at my office, in Ames building, Boston.

Value received.

($4,000. xx / 100.)

(Signed) JAMES L. KARRICK.

6 Fourth count. And the plaintiff says on the eleventh day of February 1892. he was the owner of land on the corner of Dudley and Greenville streets, Boston, said property being formerly owned by one West, and said West had given a second mortgage on said property for sixty-five thousand dollars, to one Otis Sheppard, the said mortgage being given by said West for the purpose of securing said Sheppard for the full amount of the purchase money of said land, thirty-five thousand dollars ($35,000.) and for advances to be made by said Sheppard, on his written agreement with West, to the amount of thirty thousand dollars, ($30,000) to said West, in the erection of three apartment houses on said land, and the defendant held a third mortgage, given by plaintiff to one West, for seventy thousand dollars ($70,000.00) which said mortgage said West assigned to the defendant: that plaintiff succeeded to the rights of said West in the property, and said Sheppard-West agreement, and the defendant succeeded to and assumed the obligation of said West and Sheppard in the premises, and that on the 11th day of February 1892, there remained to be advanced under said agreements, about twenty-four thousand dollars: that at the defendant's request and instigation, it was agreed between plaintiff and the defendant, that if the plaintiff would give the defendant a mortgage for twenty-one hundred and eighty-two dollars—a copy of which said mortgage is annexed, marked "D,"—on property then owned by the plaintiff, he, the defendant would advance to the plaintiff, for the purpose of enabling the plaintiff to carry on the construction and completion of said building, the sum of twenty-one hundred and eighty-two dollars ($2,782.) that the said twenty-one hundred and eighty-two dollars ($2182.) so to be advanced by the defendant, upon the strength of said mortgage, should be deducted from the amount which the defendant was then obligated to advance to the plaintiff under the said Sheppard-West and Wetmore-West and defendant's agreement with plaintiff of February 11th, 1892: and it was also agreed as a part of said agreement and contract, that the plaintiff and defendant should execute the contract of which a copy is hereto annexed marked "A," which the said parties did execute. That the defendant knew at the time of making of said contract that the plaintiff was building said houses on said land and the defendant also knew at the time that plaintiff had no money of his own, which he could use on the completion of said buildings: and that he, plaintiff, could not obtain sufficient credit to finish them, and that he, defendant, had all plaintiff's property within his control and that he, plaintiff, had no other property upon which he could borrow sufficient money to complete said buildings. And said above agreements "A," were made with the above knowledge on the defendant's part and for the purpose of enabling the plaintiff to complete said buildings. And the plaintiff says the defendant failed to keep said contract and arrangement made in connection with said mortgage for twenty-one hundred and eighty-two dollars, ($2182.) and also failed to make
7 any advances or payments on account of the same, although the plaintiff was ready and willing to keep his part of said

contract, and did keep it. And that in consequence of the failure and breach of the defendant, the plaintiff was unable to get any income from said property, which would enable him to meet the interest and other charges on said property when they became due and was unable to obtain money from any source to meet the charges and interest which might become due on said mortgage. And the defendant well knowing the foregoing facts, entered and took possession under said Wetmore-West mortgage and foreclosed the same, and the plaintiff thereby, in consequence of defendant's breach of the agreement "A" and breach of the said contract for which said mortgage, hereto annexed, marked "D" was given, lost all of said land, buildings and property, and the large profits he would have made had the defendant kept the said contracts of February 11th, 1892, all to his damage.

Fifth count. And the plaintiff says that as a partial security for his giving the mortgage of personal property for four thousand dollars and the mortgage of personal property for twenty-one hundred and eighty-two dollars, ($2182.)—copies of which said mortgages are hereto ann-xed marked "B" and "D," and making the contract "A," the defendant gave the plaintiff a promissory note, a copy of which is hereto annexed marked "C," and the plaintiff says the defendant did not keep his said contracts and undertakings, and the defendant owes the plaintiff the amount of said note and interest thereon.

(Copy.)

"A."

This agreement made this eleventh day of February 1892, by and between James L. Karrick of Boston and Charles H. Wetmore of Boston, witnesseth:

All former agreement are annulled and void. Now in consideration of these presents *to* the said Wetmore agrees to finish the three apartment houses on the lot of land at the corner of Dudley and Greenville Sts. Roxbury, according to the plans drawn by Wait & Cutter the buildings are to be finished in the manner usual to first class buildings of this class, steam heating plant, and all work and material to be first class and of the best quality and workmanship. Said Wetmore agrees to push the work continually and with all possible dispatch, and to finish same on or before May 1st 1892. The said Karrick agrees to loan or advance to said Wetmore in the manner hereinafter set forth the following sums of money. When the first floor is on and completed of the building on the corner of Dudley and Greenville Sts. $200,00 when the second floor is on $425.00 when the third floor is on $450.00 when the 4th floor is on $450.00 when the roof is on $600.00 also on
8 the building next to Hotel Dearbourn on Dudley St. when the 3rd floor is on $450.00 when the 4th floor is on $450. when the roof is on $600.00. Also when the buildings above mentioned are

ready to plaster $700.00 on each. When the — plastered and windows hung $950.00 on each, when standing finish is up $600.00 on each when the plumbing is complete and floors laid and doors hung $1050. on each, when finished and ready for occupancy $950.00 on each and thirty days after completion $1350.00 on each. Also on the Greenville St. house when plastered and windows hung $950.00 when standing finish is up $450.00 when plumbing is in doors hung and floors laid $1100.00 when completed $950.00 and thirty days after completion $1350.

Provided always, however, and these presents are upon condition that said Karrick shall not be required to advance any sum while any sums are due him from Wetmore for insurance, bills expenses or money advanced or for any reason whatever nor shall Karrick be required to advance any sum until an equal amount has been paid to him by Otis Shepard on an agreement between said Shepard and Albert J. West which agreement has been transferred to Karrick by West. This agreement is also subject to every condition and in every way to that agreement between Shepard and West.

Witness our hands and seals the day and year above first mentioned and to a like agreement, (eight words interlined in space two lines from bottom of opposite page.)

(Signed) C. H. WETMORE. [SEAL.]
JAMES L. KARRICK. [SEAL.]

(Copy.)

"E."

This agreement made this twenty-seventh day of May, 1891, by and between Albert J. West of Braintree, Mass., party of the first part and Charles J. Wetmore of Boston, part- of the second part witnesseth:

That whereas the said party of the first part has this day loaned the said party of the second part the sum of thirty thousand dollars on his mortgage note of even date herewith, and whereas to secure the said loan the said party of the second part has this day executed and delivered to the said party of the first part his mortgage deed of even date herewith of a certain piece or pacel of land situated in Roxbury corner of Dudley and Greenville streets this day purchased of said party of the first part by the said Wetmore.

Now therefore in consideration of the premises the said party of the second part agrees to build and complete at once three buildings on said lot according to plans shown this day or if modified to
9 be of equal cost to those shown, said buildings to be built in a substantial and workmanlike manner and to be finished in like manner to other buildings of same class, and said party of second part agrees that as soon as the buildings are insurable, they shall be insured and kept insured during the continuance of said

mortgage in such sum or sums as will indemnify said party of the first part mortgagee as his interest may appear.

And it is understood by said parties to this agreement that the said sum of thirty thousand dollars, is to be advanced in cash by the said party of the first part to the party of the second part in the following manner, viz.

$1000. on each building when the first floor is on.
$800. " " " " " second
$800. " " " " " third
$800. " " " " " fourth
$1000. " " " " " roof is on.
$800. " " " " " ready to plaster.
$1000. " " " " " plastered and windows hung.
$500. " " " " " standing finish is up.
$1000. " " " " " plumbing is in doors hung and floor laid.
$1000. " " " " " when completed.
$1300. " " " " " 30 days after completion.

Provided always that these presents are upon the condition, that at the time or times when either or any of said advances are to be made, no lien shall exist upon said mortgaged premises and at the time mentioned for the last payment there shall be no possibility of any lien or incumorance than can effect or impair the security of said mortgage.

In witness whereof we the said parties hereto set our hands and seals for ourselves our heirs or assigns the day and year first above mentioned.

(Signed) ALBERT J. WEST. [SEAL.]
CHARLES H. WETMORE. [SEAL.]

"B."

Know all men by these presents that I Charles H. Wetmore of Boston in the county of Suffolk and Commonwealth of Massachusetts, in consideration of four thousand ($4000) dollars to me paid by James L. Karrick of Boston aforesaid the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said James L. Karrick, the following goods and chattels, namely about five hundred and seventy-four thousand (574 M) bricks more or less, consisting of light hard and face bricks now situated on Mystic wharf in Chelsea and about to be hauled to the corner of Dudley and Greenville streets in said Boston, including the bricks there now piled, also one hundred window frames at Dudley street
10 aforesaid, and about fourteen thousand feet of lumber covering said bricks on Mystic wharf. To have and to hold all and singular the said goods and chattels to the said James L. Karrick and his executors, administrators, and assigns to their own use and behoof forever. And I hereby covenant with the vendee that I am the lawful owner of the said goods and chattels: that

they are free from all incumbrances; that I have good right to sell the same as aforesaid: and that I will warrant and defend the same against the lawful claims and demands of all persons. Provided nevertheless, that if I, or my executors, administrators, or assigns, shall pay unto the vendee, or his executors, administrators, or assigns, the sum of four thousand ($4000) dollars in three (3) months from this date, with interest as stated in my note of even date signed by me, and until such payment shall keep the said goods and chattels insured against fire in a sum not less than — dollars for the benefit of the vendee, and executors, administrators, and assigns, in such form and in such insurance companies as they shall approve: shall not waste or destroy the said goods and chattels, nor suffer them or any part thereof to be attached on mesne process: and shall not, except with the consent in writing of the vendee or his representative, attempt to sell or to remove from said Dudley and Greenville streets, the same or any part thereof, then this deed, as also the aforesaid note, shall be void. But upon any default in the performance or observance of the foregoing conditions, the vendee or his executors, administrators, or assigns, may sell the said goods and chattels at public auction, first giving three days' notice in writing of the time and place of sale to me, or my representatives, or by leaving such notice at my last and usual place of abode, or publishing such notice once a week for three weeks in some one newspaper published in said Boston. And out of the money arising from such sale the vendee, or his representative shall be entitled to retain all sums then secured by this mortgage, whether then orthere after payable, including all costs, charges, and expenses incurred or sustained by him or them in relation to the said property, or to discharge any claims or liens of third persons affecting the same rendering the surplus if any, to me or my executors, administrators, or assigns. And it is agreed that the vendee or his executors, administrators, or assigns, or any person or persons in their behalf, may purchase at any sale made as aforesaid, and that until default in the performance or observance of the condition of this deed, I and my executors, administrators, and assigns, may retain possession of the above mortgaged property, and may use and enjoy the same, but after such default, the vendee or those claiming under me, may take immediate possession of said property, and for that purpose may so far as I can give authority therefor, enter upon any premises on which said property or any part thereof may be situated and remove the same therefrom. In witness whereof, I the said Charles W. Wet-
11 more, hereunto set my hand and seal this eleventh day of February in the year one thousand eight hundred and ninety-two.

CHARLES H. WETMORE AND SEAL.

Signed and sealed in presence of

—— ——.

February 12, 1892, 11 & 1 min. a. m.—Rec'd. Ent'd & ex'm'd per
JOHN M. GALVIN, *City Clerk.*

CITY OF BOSTON, *Sept.* 12, 1892.
A true copy from records of mortgages Lib. 667, fol. 148.
JOHN M. GALVIN, *City Clerk.*

"D."

Know all men by these presents that I Charles H. Wetmore of Boston in the county of Suffolk and Commonwealth of Massachusetts, in consideration of twenty one hundred and eighty-two ($2182). dollars to me paid by James L. Karrick of Boston aforesaid, the receipt whereof is hereby acknowledged do hereby grant, sell, transfer and deliver unto the said James L. Karrick, the following goods and chattels namely, about five hundred and seventy-four thousand (574 M) bricks more or less consisting of light hard and face bricks now situated on Mystic wharf in Chelsea in said Suffolk, and about to be hauled to the corner of Dudley and Greenville street- in said Boston including the bricks there now piled and one hundred window frames at said Dudley street and also about fourteen hundred feet of lumber covering said bricks on Mystic wharf subject to a mortgage for four thousand dollars. To have and to hold all and singular the said goods and chattels to the said James L. Karrick and his executors, administrators and assigns to their own use and behoof forever. And I hereby covenant with the grantee that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances, except as aforesaid that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons. Provided nevertheless that if I or my executors, administrators or assigns shall pay unto the grantee or his executors, administrators or assigns the sum of twenty-one hundred and eighty-two dollars in one month from this date with interest as stated in my note of even date signed by me and until such payment shall keep the said goods and chattels insured against fire in a sum not less than — dollars for the benefit of the grantee and — executors administrators and assigns in such form and in such insurance companies as they shall approve, shall not waste or destroy the said goods and chattels, nor suffer them or any part thereof to be attached
12 on mesne process and shall not except with the consent in writing of the grantee or his representatives attempt to sell or to remove from said Dudley & Greenville streets the same or any part thereof, then this deed as also the aforesaid note shall be void. But upon any default in the performance or observance of the foregoing condition the grantee or his executors, administrators or assigns may sell the said goods and chattels at public auction, first

giving three days' notice in writing of the time and place of sale to me or my representatives or by leaving such notice at my last and usual place of abode, or publishing such notice once a week for three successive weeks in some one newspaper published in said Boston. And out of the money arising from such sale the grantee or his representatives shall be entitled to retain all sums then secured by this mortgage, whether then or thereafter payable including all costs, charges and expenses incurred or sustained by him or them in relation to the said property or to discharge any claims or liens of third persons affecting the same rendering the surplus, if any, to me or my executors, administrators or assigns. And it is agreed that the grantee or his executors, administrators or assigns or any person or persons in their behalf may purchase at any sale made as aforesaid; and that until default in the performance or observance of the condition of this deed, I and my executors, administrators and assigns may retain possession of the above mortgaged property and may use and enjoy the same but after such default the grantee or those claiming under me may take immediate possession of said property and for that purpose may, so far as I can give authority therefor enter upon any premises on which said property or any part thereof may be situated and remove the same therefrom.

In witness whereof I the said Charles H. Wetmore hereunto set my hand and seal this eleventh day of February in the year one thousand eight hundred and ninety two.

CHARLES H. WETMORE AND SEAL.

Signed, sealed and delivered in presence of

—— ——.

February 12, 1892, 11 & 1 min. a. m.—Rec'd, ent'd, & ex'm'd per
JOHN M. GALVIN, *City Clerk.*

CITY OF BOSTON, *September* 12, 1892.

A true copy from records of mortgages, Libro 667, folio 150.
Attest: JOHN M. GALVIN, *City Clerk.*

To the damage of the said plaintiff (as he says) the sum of twenty thousand dollars, which shall then and there be made to appear, with other due damages. And whereas the said plaintiff says, that the said defendant has not in his own hands and possession, goods and estate to the value of twenty thousand dollars aforesaid,
13 which can be come at to be attached, but has intrusted to and deposited in the hands and possession of the Mechanics national bank, a corporation duly organized under the laws of the United States and having its place of business at Boston, and the Northampton Institution for Saving- a corporation duly organized under the laws of Massachusetts and having its usual place of business at Northampton in the county of Hampshire and Common-

wealth aforesaid, trustees of the said defendant's goods, effects and credits, to the said value: We command you, therefore, that you summon the said supposed trustees (if they may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any they have why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against the defendant's goods, effects, or credits in the hands and possession of the said trustees. And have you there this writ with your doings therein.

Witness, Albert Mason, Esquire, at Boston, the second day of September in the year of our Lord one thousand eight hundred and ninety-two.

JOS. A. WILLARD, *Clerk.*

On which said writ are the following returns by the officers who served the same, to wit:

BOSTON, *September 2nd*, 1892.

SUFFOLK, *ss:*

By virtue of this writ I this day at 30 minutes past 3 o'clock p. m. attached all the right, title and interest — the within named James L. Karrick has in and to any and all real estate in the county of Suffolk and at the same time I attach specially as the property of said Karrick the following described real estate the record title to which stands in the name of Henrietta B. Karrick, viz: Beginning at a point in the southerly side of Allston street, Boston, on a line in prolongation of the middle of brick partition wall thence running southerly on said line and through the middle of a brick partition wall 106 52/100 feet by land now or formerly of E. Cushman, thence westerly through a fence and the middle of a brick partition wall to land of R. F. Evans *et als.* 34 88/100 feet, thence northerly along the outside of a wall 19 26/100 feet by land of said Evans *et als.* thence westerly ten feet by land of said Evans *et als.* by a line along outside of wall thence northerly by land of Timothy Kelleher by a line on a plan hereinafter mentioned to Allston street 84 40/100 feet thence easterly along the line of said Allston street 45 25/100 feet to the point of beginning: Containing 4,197 2/10 feet of land more or less, also a small parcel adjacent and lying southerly from said premises containing 52 8/10 feet and bounded northerly on said premises by a line through said fence 15 52/100 feet, westerly on other land of W. W. Warren estate not hereby conveyed by a line along the outer face-wall of the 14 wall on said adjoining land 4 92/100 feet, southeasterly by the passageway hereinafter mentioned 15 80/100 feet and easterly by said land now or formerly of E. Cushman by a line running through the middle of a brick partition wall 1 88/100 feet both of the above described parcels are shown on a plan of estate of W. W. Warren dated Oct. 23, 1890 and recorded Suffolk Deeds Libro

1978 page 288. On the same day I deposited an attested copy of this writ in the registry of deeds in the county of Suffolk with as much of my return thereon as relates to attachment of real estate, on the 3rd day of said September, at 10.35 o'clock a. m. I summoned the within named trustee Mechanics National Bank to appear and show cause at court as within directed by delivering in hand to Samuel A. Merrill its cashier an attested copy of this writ, on the 15th day of September 1892, I summoned the within named defendant to appear and answer at court as within directed by delivering to him in hand an attested copy of this writ.

*Fees.*

| | |
|---|---|
| Attch'ts | $2.00 |
| Copies | 3.00 |
| Services | 1.00 |
| Recording | .50 |
| Travel | .24 |
| | $6.74 |

FREDERICK P. KNAPP,
*Deputy Sheriff.*

HAMPSHIRE, ss:

SEPTEMBER 6TH, 1892.

By virtue of this writ I this day at 8 o'clock p. m. summoned the within named The Northampton Institution for Savings, to appear at court as within directed, by giving Lafayette Maltby, its treasurer an attested copy of this writ in hand.

*Fees.*

| | |
|---|---|
| Service | .50 |
| Travel | 1.60 |
| Copy | 1.00 |
| | $3.10 |

ANSEL WRIGHT,
*Deputy Sheriff.*

On said first Monday of October, A. D. 1892, the plaintiff appeared by T. J. McKay, his attorney and entered the above action and on, the third day of said October 1892, the following was filed, to wit:

15 SUFFOLK, ss:

Superior Court, October Sitting, 189–.

WETMORE, Pl'ff,
*v.*
KARRICK, D'f't.

In the above action I appear for the def't.
SHERMAN L. WHIPPLE.

On the fifth day of said October 1892, the following was filed, to-wit:

SUFFOLK, ss.

Superior Court, October Sitting, 189–.

CHAS. H. WETMORE, Pl'ff,
*v.*
JAS. L. KARRICK, D'f't.

In the above action I appear from the Northampton Institution for Savings, trustee.
SHERMAN L. WHIPPLE.

And afterwards, to wit, on the eighth day of said October 1892, the following was filed, to wit:—

Superior Court, Oct. 8, 1892.

WETMORE
*vs.*
KARRICK.

In the above entitled action the plaintiff claims a trial by jury.
CHAS. H. WETMORE,
By J. T. McKAY.

And on the tenth day of said October 1892, the following were filed to wit:

16 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss:

Superior Court, October Term, 1892.

CHAS. H. WETMORE
*v.*
JAMES L. KARRICK & TR.

*Answer of Alleged Trustee.*

And now the Northampton Institution for Savings summoned as trustee of the principal defendant in the above entitled action, ap-

pears and makes answer that, at the time of the service of the plaintiff's writ upon him, he had not in his hands or possession any goods, effects or credits of the said defendant.

Wherefore he prays that he may be discharged, and for his costs.

NORTHAMPTON INSTITUTION FOR SAVINGS.
L. MALTBY, *Treasurer.*

Oct. 8, 1892.—Then the above named L. Maltby treasurer made oath that the foregoing answer subscribed by him is true, before me.

S. D. DRURY,
*Justice of the Peace.*

SUFFOLK, *ss:*

Superior Court, October Sitting, 1892.

C. H. WHETMORE, Pl'ff,
*v.*
J. L. KARRICK, D'f't.

In the above action I appear for Mechanics' Nat. Bk. trustee.

H. M. BURTON, 50 *State St.*

On the tenth day of said October 1892, no answer having been filed herein for said trustee Mechanics national bank a default was thereupon entered against it.

And on the second day of November, in said year, the following was filed, to wit:

17 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court, October Sitting, 1892.

WETMORE
*v.*
KARRICK & TRUSTEE.

*Defendant's Answer.*

Now the defendant comes, and for answer denies each and every item, count and allegation in the plaintiff's writ and declaration contained as fully and specifically as if each item, count and allegation were separately denied.

And further answering the third count of the plaintiff's declaration, the defendant denies that he ever made or signed a promissory note, a copy whereof is annexed to the plaintiff's declaration, and marked "C," and he denies the genuineness of the signature of said note, and demands the plaintiff to prove the same at the trial.

And further answering said third count, the defendant says that if he ever made and signed any promissory note, a copy whereof is annexed to the plaintiff's declaration, marked "C," it was for the personal accommodation of the plaintiff, and upon the agreement and stipulation that the plaintiff should never assign to another or collect the same.

And further answering said third count, the defendant says that if he ever made and delivered said note, he has fully paid the same, and owes him nothing on account thereof.

And further answering all the counts of the plaintiff's declaration, the defendant says that there has been an accord and settlement and mutual satisfaction of all claims between the plaintiff and the defendant prior to the bringing of this suit.

JAMES L. KARRICK,
By His Attorney, SHERMAN L. WHIPPLE.

Thence the case was continued from sitting to sitting to the April sitting 1893, when on the fifth day of June, in said year, the following were filed, to wit:—

18 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Suffolk*, }

Superior Court.

CHAS. H. WETMORE
*vs.*
JAMES L. KARRICK and TRUSTEE.

*Motion to Amend Answer.*

Now the defendant comes and moves to amend his answer in the above entitled cause by adding thereto the following:

And further answering the defendant says that if he ever signed the promissory note a copy whereof is annexed to the plaintiff's declaration marked "C," said promissory note was wholly without consideration and is void as between the parties thereto; that the same was given as a receipt for the promissory note of the plaintiff for an equal amount, of even date therewith, given by the plaintiff to the defendant; that the parties thereafter agreed that said notes should cancel and off-set each other and be mutually returned to the makers thereof; that the defendant has been ever ready and willing to make said return, but the plaintiff has failed so to do. And the defendant owes the plaintiff nothing on account of said note.

By His Attorney, SHERMAN L. WHIPPLE.

Endorsed on which said amended answer is the following, to wit:—

This may be filed. George R. Swasey, pl'ff's att'y.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

Superior Court.

CHAS. H. WETMORE
*vs.*
JAMES L. KARRICK and TRUSTEE.

*Declaration in Set-off.*

First count. The defendant says that the plaintiff made a promissory note payable to the order of the defendant, a copy whereof is hereto annexed marked "A," and the plaintiff owes the defendant the amount of said note and interest thereon.

Second count. The defendant says that the plaintiff made a certain promissory note payable to the order of the defendant, 19 a copy whereof is hereto annexed marked "B," and the plaintiff owes the defendant the amount of said note and interest thereon.

Third count. The defendant says that he entered into a certain agreement in writing with the plaintiff, a copy whereof is hereto annexed marked "C," and the defendant has kept and fulfilled all the stipulations of said contract on his part to be kept and fulfilled; but the plaintiff wholly failed to keep, fulfill and discharge the stipulations and agreements contained in said contract by the plaintiff to be performed and fulfilled, to the great damage of the defendant.

By His Attorney, SHERMAN L. WHIPPLE.

"A."

$2182. BOSTON, 11*th February*, 1892.

For value received, I, Charles H. Wetmore, promise to pay to James L. Karrick, or order, the sum of twenty-one hundred & eighty-two dollars in one (1) month—from this date, with interest to be paid—at the rate of — per centum per — during said term, and for such further time as the said principal sum, or any part thereof shall remain unpaid.

Signed in presence of
(Signed) CHARLES H. WETMORE.

[On the margin:] Secured by mortgage of personal property in Chelsea & Boston to be recorded in — clerk's office at Boston.

"B."

$4000. BOSTON, 11*th February*, 1892.

For value received, I, Charles H. Wetmore, promise to pay to James L. Karrick, or order, the sum of four thousand dollars in

three (3) months from this date, with interest to be paid—at the rate of — per centum per — during said term, and for said further time as the said principal sum, or any part thereof shall remain unpaid.

Signed in presence of
(Signed) CHARLES H. WETMORE.

[On the margin:] Secured by mortgage of personal property in Chelsea & Boston, to be recorded in clerk's office in Boston.

"C."

This agreement made this eleventh day of February, 1892, by and between James L. Karrick of Boston and Charles H. Wetmore of Boston, witnesseth:

All former agreements are annulled and void. Now in consideration of these presents the said Wetmore agrees to finish the
20 three apartment houses on the lot of land at the corner of Dudley and Greenville Sts., Roxbury, according to the plans drawn by Wait & Cutler, the buildings are to be finished in the manner usual to first class building of this class, with all modern improvements, steam heating, plant and all work and material to be of the best quality and workmanship. Said Wetmore agrees to push the work continually and with all possible despatch and to finish same on or before May 1st, 1892. The said Karrick agrees to loan or advance to said Wetmore in the manner hereinafter set forth the the following sums of money: When the first floor is on and completed of the building on the corner of Dudley and Greenville Sts. $200.00, when the 2nd floor is on $425.00, when the third floor is on $450.00, when the fourth floor is on $450.00, when the roof is on $600. Also on the building next to Hotel Dearborn on Dudley St., when the 3rd floor is on $450.00, when the fourth floor is on $450.00, when the roof is on $600. Also when the buildings above mentioned are ready to plaster $700. on each, when plastered and windows hung $950.00 on each, when standing finish is up $600. on on each, when plumbing is complete, doors hung and floors laid, $1050.00 on each, when finished and ready for occupancy $950.00 on each, and thirty days after completion $1350.00 on each. Also on the Greenville St. house, when plastered and windows hung $950.00, when standing finish is up $450.00, when plumbing in in, doors hung and floors laid $1100.00, when completed $950.00 and thirty days after completion $1350.00. Provided always however and these presents are upon condition that said Karrick shall not be required to advance any sum while any sums are due him from Wetmore for insurance, bills, expenses or money advanced, or for any reason whatever, nor shall Karrick be required to advance any sum until an equal amount has been paid to him by Otis Shepard on an agreement between said Shepard and Albert J. West, which agreement has been transferred to Karrick by West. This agree-

ment is also subject to every condition and in every way to that agreement between Shepard and West.

Witness our hands and seals the day and year above first mentioned and to a like agreement.

CHARLES H. WETMORE.
JAMES L. KARRICK.

Endorsed on which said declaration in set-off is the following, to-wit:—

This may be filed. George R. Swasey, pl'ff's att'y.

On the seventh day of said June, 1893, the following was filed, to wit:—

21 COMMONWEALTH OF MASSACHUSETTS, } ss:
*Suffolk*, }

Superior Court.

CHARLES H. WETMORE }
*vs.* }
JAMES L. KARRICK. }

Sixth count. The plaintiff says that in February, 1892, he was the owner of land corner of Dudley and Greenville streets in Boston, and was erecting thereon three double houses under and in pursuance of a contract with one A. J. West, by which said West was obliged to advance to the plaintiff $30,000; that said West was secured for said advances by a mortgage for $70,000 given him by plaintiff on said land; that the defendant succeeded to and assumed the obligations of said West in said contract relating to said advances; that the plaintiff had no means to build said houses other than the money to be advanced under said contract; that on or about February eleventh, 1892, the defendant proposed the making of a new agreement as to the money remaining to be advanced under the said West contract so assumed by the defendant, which remaining advances were about $24,000, and in consequence thereof, it was agreed between plaintiff and defendant, that if the plaintiff would give the defendant two mortgages, one for $4,000 and one for $2,182, upon certain personal property owned by the plaintiff, the defendant would advance the $6,182, so to be secured by said mortgages, as the plaintiff might need it in the construction of said houses, and would advance the balance of said $24,000 or thereabouts, after deducting said $6,182 in the manner agreed upon in the contract, a copy of which is hereto annexed marked "A," the defendant being at the time further secured as to the advancing of said money by an assignment from said West of the $70,000 mortgage on said land and buildings. And the plaintiff says he did give the two mortgages, and that, thereupon, the defendant agreed to advance said

$6,182, as needed by the plaintiff, and that the contract as to the balance of said $24,000 or thereabouts, was then entered into and agreed to as a part of said transaction and contract.

And the plaintiff says his only means of obtaining money to complete said houses, and keep and perform his obligations under said second mortgage which had been assigned to the defendant, was by and through the faithful performance by the defendant of the contract so made on or about February 11th, aforesaid; that by reason of giving said two mortgages on said personal property, the plaintiff had exhaused his only remaining means of raising money, and that his means and credit were not such as to enable him to obtain material and labor on credit; that the defendant, well knowing all the foregoing premises, broke and failed to keep his said contract
22 of February 11th, and that, in consequence of said failue and breach, the plaintiff was unable to finish said houses, and was unable to earn the payments which would have enured to him under said contract.

And the defendant wrongfully claiming a breach of the condition of said second mortgage for $70,000, (said breach, if any there was, was owing to and in consequence of the breach of the defendant's agreement of said February 11th,) entered and foreclosed under said second mortgage, and the plaintiff, in consequence of said above mentioned wrongful acts of the defendant, lost all that he had put into said houses, and the profits which would have accrued to him, had the defendant kept his said contract.

By His Attorney, GEORGE R. SWASEY.

Endorsed whereon is the following, to wit:
"This may be filed. Sherman L. Whipple, def't's att'y."

And on the eighth day of said June 1893, the following were filed, to-wit:—

SUFFOLK, *ss*:

Superior Court.

CHAS. H. WETMORE
*vs.*
JAMES L. KARRICK.

*Plaintiff's Demurrer to Defendant's Declaration in Set-off.*

Now comes the plaintiff and demurs to the defendant's declaration in set-off and assigns as causes of demurrer the following:

1st. As to all the counts of the said declaration in set-off, he says they cannot be allowed in this action except as the first 2 counts of said declaration in set-off may be set off against the 3rd and 5th counts of plaintiff's declaration.

2nd. As to the last count of said declaration in set-off, the plaintiff

says it is not a proper matter to be set off as against any count of the plaintiff's declaration.

By His Att'y, GEO. R. SWASEY.

I hereby certify that I am of the opinion that there is such probable ground in law for said above demurrer as to make it a fit subject for judicial inquiry and trial, and that said demurrer is not intended for delay.

GEO. R. SWASEY,
*Plaintiff's Attorney.*

On which said demurrer is the following endorsement by the court, to-wit:—

"Demurrer to third count in set-off sustained."

23 SUFFOLK, *ss*:

Superior Court.

CHAS. H. WETMORE
*vs.*
JAMES L. KARRICK.

*Plaintiff's Answer to Defendant's Declaration in Set-off.*

Now comes the plaintiff, and without waiving his demurrer to said declaration in set-off, for answer denies each and every allegation in each of the counts of said declaration in set-off contained.

By His Attorney, GEO. R. SWASEY.

And thereafterwards, to wit:—on the thirteenth day of said June 1893, the following questions were framed for the jury and were answered by them as follows, to wit:—

SUFFOLK, *ss*:

Superior Court.

WETMORE
*vs.*
KARRICK.

Ques. 1. Had the defendant advanced to the plaintiff on or before March 3 1892, an amount equal to the amount which Shepard had paid to the defendant? Ans. Yes.

2. On March 3, 1892, were there any sums due from the plaintiff to the defendant for insurance, bills, expenses or money advanced? Ans. No.

3. Did the defendant on February 11, 1892, make an oral agreement with the plaintiff to advance to the plaintiff $6182 upon the two personal mortgages given by the plaintiff to the defendant, as the plaintiff might need the advance in the construction of said building? Ans. Yes.

4. What was the amount of the defendant's advances to, or for the benefit of the plaintiff, before March 3, 1892, under the written contract between the parties under date of February 11, 1892?

And did those advances equal the amount which the plaintiff was entitled to, *rendered* by the progress he had made upon said houses? Ans. No.

FRANK W. BROAD,
*Foreman of the Jury.*

Thence the case was continued to the July sitting 1893, when on the twenty-seventh day of said July 1893, the following was filed, to-wit:—

24 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court, July Sitting, 1893.

WETMORE
*vs.*
KARRICK.

*Motion to Have Verdict Ordered for Defendant.*

Now the defendant comes and moves in the above entitled case that judgment be ordered for the defendant.

By His Attorney, SHERMAN L. WHIPPLE.

And also, to wit, on said twenty-seventh day of said July 1893, the following was filed, to wit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Superior Court, August Sitting, 1893.

WETMORE
*vs.*
KARRICK.

Now the defendant comes and moves that the special findings of the jury in the above entitled case be set aside.

By His Attorney, SHERMAN L. WHIPPLE.

Endorsed on which said motion is the following, to wit:
"Motion allowed. A. M."

Thence the case was continued from sitting to sitting to the January sitting, 1894, when on the twelfth day of February, in said year, the following was filed to wit:

SUFFOLK, *ss* :

Superior Court.

CHARLES H. WETMORE
*vs.*
JAMES L. KARRICK.

*Seventh Count of Plaintiff's Declaration.*

The plaintiff says that on February 11th, 1892, he was the owner of a certain parcel of land at the corner of Dudley and Green-
25 ville streets, in Boston, and was erecting thereon three double apartment houses; that the defendant prior to said date had been advancing the plaintiff money for the erection of said houses under an agreement relating thereto; that on or about February 11th 1892, the defendant proposed to the plaintiff the making of a new agreement as to advances to be made to the plaintiff for the completion of said houses, and in consequence thereof it was agreed between the plaintiff and the defendant that if the plaintiff would give to the defendant two mortgages, one for four thousand (4000) dollars and one for two thousand one hundred and eighty-two (2182) dollars upon certain personal property and would execute the contract, a copy of which is hereto annexed, marked A, the defendant would advance to the plaintiff or pay for his benefit about six thousand one hundred and eighty-two (6182) dollars as the plaintiff might need said advances and payments in the construction of said houses and would advance to the plaintiff certain other moneys in the manner mentioned and agreed upon in the contract, a copy of which is hereto annexed marked A. And the plaintiff says he did give two mortgages upon certain personal property and did execute a contract, a copy of which is hereto annexed marked A, and thereupon the defendant agreed to advance to the plaintiff or to pay for his benefit about six thousand one hundred and eighty-two (6182) dollars as the plaintiff might need said advances and payments in the construction of said houses and to advance to the plaintiff certain other moneys in the manner mentioned and agreed upon in the contract, a copy of which is hereto annexed marked A.

And the plaintiff says that his only means of obtaining money at said time, namely, February 11th, 1892, to complete said houses and to keep and perform his obligations under a certain mortgage on said premises—given by him to one West—was by and through the faithful performance by the defendant of the contract so made on or about February 11th, aforesaid; that by giving two said mortgages on said personal property to the defendant the plaintiff exhausted his only remaining means of raising money, and that his means and credit were not such at that time as to enable him to obtain material and labor on credit; that the defendant well knowing all the foregoing premises at the time of making

said contract of February 11th and knowing of the existence on said mortgage on said premises, broke and failed to keep his said contract of February 11th, and without the knowledge of the plaintiff obtaining an assignment of the said Wetmore-West mortgage on said premises, and that in consequence of said failure and breach by the defendant of his said contract the plaintiff was unable to finish said houses; and the defendant wrongfully claiming a breach of the conditions of said Wetmore-West mortgage, of which he had obtained an assignment unbeknown to this plaintiff, entered upon said premises, excluded the plaintiff therefrom and purported to foreclose the said mortgage for an alleged breach of the conditions of the same; and the plain-
26 tiff says that said breach of said mortgage, if any there was, was because of the failure of the defendant to keep his said contract of February 11th, and in consequence of said breach by the defendant of his said contract, and because of his wrongful claim of a breach of the conditions of said mortgage and because of his wrongful exclusion of the plaintiff from the premises, and because of his wrongful purported foreclosure of said mortgage, the plaintiff was unable to complete said houses and lost in consequence thereof the large profits and returns which would have enured to him had the defendant kept his said contract.

By Plaintiff's Attorney, GEORGE R. SWASEY.

On which said motion is the following endorsement by the court, to wit:—

"Allowed."

Whereupon upon the twenty-first day of said February 1894, the cause after a full hearing was submitted to a jury, sworn to try the same and the following questions were also submitted and were answered and returned into court with their verdict as follows, to wit:

SUFFOLK, *ss:*

Superior Court.

CHARLES H. WETMORE
*vs.*
JAS. L. KARRICK.

*Question for the Jury.*

What amount is included by the jury in the assessment of damages on account of the value added by the plaintiff to the premises, by reason of materials used and labor furnished in the erection of said buildings, which were not furnished or paid for by the defendant, including the value resulting from the use of said mortgaged personal property in excess of the amount paid by the defendant, for, or on account of said personal property?

The jury answer.
Eight thousand four hundred and twelve dollars and twenty-eight cents.

JOHN W. ALLISON,
*Foreman of the Jury.*

27 SUFFOLK, *ss:*

The Superior Court, January Sitting, A. D. 1894.

CHARLES H. WETMORE, Pl'f,
*vs.*
JAMES L. KARRICK, D'f't.

The jury find for the plaintiff, and assess damages in the sum of nine thousand one hundred and sixty-nine dollars and thirty-nine cents.

JOHN W. ALLISON,
*Foreman of the Jury.*

Whereupon, on the twenty-third day of said February, 1894, the following was filed, to wit:

COMMONWEALTH OF MASSACHUSETTS,
*Suffolk,* *ss:*

Superior Court, February Sitting, 1894.

WETMORE
*vs.*
KARRICK.

Now the defendant comes and moves that the date for filing his exceptions in the above entitled case be extended so that the same may be filed at any time on or before March 5th, 1894.

By His Attorney, SHERMAN L. WHIPPLE.
GEORGE R. SWASEY,
*For Plaintiff.*

Upon which said motion is the following endorsement by the court, to-wit:
"Allowed."

And on the twenty-fourth day of said February 1894, the following is filed, to wit—

28 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss.:

Superior Court, February Sitting, 1894.

WETMORE
*vs.*
KARRICK.

Now the defendant comes in the above entitled case, after verdict for the plaintiff, and respectfully moves that the verdict be set aside and a new trial of the case granted upon the following grounds, to wit:

1st. That the verdict is against the evidence and the weight of evidence.

2nd. That the damages awarded are excessive.

3rd. On account of improper, erroneous and misleading statements made by plaintiff's counsel in argument.

4th. On the ground of evidence newly discovered since the trial of said case and not known to defendant or defendant's attorney until after the trial of the case, on the question of liability, as appearing in the affidavit hereto annexed.

By His Attorney, SHERMAN L. WHIPPLE.

I, John S. Lamprey, being duly sworn, hereby depose and say that sometime in the winter of 1892, Charles H. Wetmore of Boston came to my office and stated that he could not go on with his contract on the buildings at the corner of Dudley and Greenville streets; that the mortgagee was either in possession or about to take possession for the purpose of foreclosure; that he had given a mortgage and later a bill of sale of certain personal property, consisting chiefly of a large number of brick sold to him by Anderson, and then located, for the most part, at Mystic wharf, to James L. Karrick upon the consideration that Karrick would pay the freight charges and cartage of brick from the wharf to the houses on Dudley and Greenville streets; that he believed the personal property exceeded in value the amount that Karrick would have to pay for freight and cartage and Wetmore requested me to visit Karrick and ask him if he would not pay to Wetmore whatever the property proved to be worth above the cost of freight charges and cartage. Said Wetmore did not at any time in the interview claim that Karrick was to advance any money on the mortgages or on the brick except for the purpose of paying freight charges and cartage. I thereupon called on Mr. Karrick at his office in the Ames building and made the request which Wetmore desired me to make, and Karrick stated that he had already paid on account of the brick more than
29 their value and for that reason would not comply with Wetmore's request. I subsequently reported this interview to Wetmore.

JOHN S. LAMPREY.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

FEBRUARY 24, 1894.

Personally appeared the above named John S. Lamprey and made solemn oath that the foregoing affidavit by him subscribed is true, before me.

ROBERT W. FROST,
*Justice of the Peace.*

Endorsed on which said motion is the following, to wit:
"Boston, Mar. 3/94. Motion overruled. Daniel W. Bond, J. S. C."

And thereupon, said defendant, by his said attorney alleged sundry exceptions to the ruling and opinion of the court in certain matters of law, which were rduced to writing, as on file.

Thence the case was continued from sitting to sitting to the April sitting 1897, when on the eighth day of June, in said year, at a calling of the docket under the general order of court this action was dismissed.

On the tenth day of said June, 1897, said dismissal was stricken off and thereafterwards, to wit:—on the twenty-eighth day of said June 1897, the following was filed, to wit:—

SUFFOLK, *ss*:

Superior Court, Sitting 1897,

WETMORE, Pl't'ff,
*vs.*
KARRICK, Def't.

In the above action please withdraw my appearance for the defendant Karrick.

SHERMAN L. WHIPPLE.

Thence the case was contiued from sitting to sitting to the April sitting 1898, when on the thirteenth day of June, in said year, the following was filed, to wit:—

30 SUFFOLK, *ss*:

Superior Court.

WETMORE
*vs.*
KARRICK.

I hereby withdraw as attorney for the defendant.

E. B. GOODSELL.

Thence the case was continued to the July sitting 1898, when said exceptions, having been presented to the court, were disallowed as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the qustions of law raised by the defendant's exceptions.

Thence the case was continued from sitting to sitting unto the April sitting 1899, when on the twelfth day of June, 1899, at a calling of the docket under the general order of court, said action was dismissed.

And now at this present October sitting, 1900, to wit, on the eighteenth day of said October 1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year but not discovered.

And thereafterwards, to wit: on the tenth day of November, 1900, the following is filed, to wit:

SUFFOLK, *ss*:

Superior Court.

CHARLES H. WETMORE
*vs.*
JAMES L. KARRICK and TRS.

In the above entitled cause the alleged trustee, the Northampton Institution for Savings is hereby discharged.

GEORGE R. SWASEY,
*Att'y for Pl'ff.*

November 10, 1900.

And on the seventeenth day of said November 1900, the following is filed, to wit:

31 SUFFOLK, *ss*:

Superior Court.

CHARLES H. WETMORE
*vs.*
JAMES L. KARRICK.

*Motion for Judgment.*

Now comes the plaintiff in said case after verdict in the same and moves that judgment be entered on the verdict in said case.

By His Attorney, GEORGE R. SWASEY.

Endorsed on which said motion is the following, to wit:

"Motion all'd and judgment ordered on verdict. Nov. 20, 1900."

Whereupon judgment is entered accordingly.

It is therefore considered by the court on said twentieth day of November, A. D. 1900, that said Charles H. Wetmore, plaintiff as

aforesaid recover against said James L. Karrick, defendant as aforesaid the sum of twelve thousand eight hundred eighty-one dollars and forty-six cents damages and costs of suit taxed at forty dollars and forty-six cents.

And execution is awarded for the same sums against the goods, effects and credits of the said defendant in the hands and possession of the said Mechanics national bank, trustee as aforesaid.

It is further considered by the court on the day and year aforesaid that said Northampton Institution for Savings, trustee as aforesaid, recover against said Charles H. Wetmore, plaintiff as aforesaid its costs of suit taxed at seven dollars and sixty-four cents.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said superior court to be hereto affixed.

Witness, Albert Mason, Esquire, chief justice of our said superior court, at Boston, in said county of Suffolk, this twenty-fourth day of November, in the year of our Lord one thousand nine hundred.

[SEAL.]

Att. JOS. A. WILLIARD, *Clerk.*

32 *Demurrer.*

Filed February 20, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to Use of John F. McKay, Plaintiff,
*vs.*
JAMES L. KARRICK, Defendant.
} At Law. No. 46600.

The defendant James L. Karrick, through his attorneys J. J. Darlington and Millan & Smith demurs to the declaration filed herein and says that it is bad in substance.

J. J. DARLINGTON,
MILLAN & SMITH,
*Att'ys for Defendant.*

NOTE.—One of the matters of law intended to be argued in support of this demurrer is that the court was without jurisdiction to render the judgment in the declaration referred to, because the case was restored to the docket after the end of the term in which judgment of dismissal had been entered therein.

J. J. DARLINGTON,
MILLAN & SMITH,
*Att'ys for Defendant.*

Mr. William L. Ford, attorney for the plaintiff:

Please take notice that the above demurrer has been set
33 down for hearing in circuit court No. 2, and will be called for argument before Chief Justice Clabaugh on Friday, March 4, 1904, at ten o'clock, a. m., or as soon thereafter as counsel can be heard.

J. J. DARLINGTON,
MILLAN & SMITH,
*Att'ys for Defendant.*

*Demurrer Overruled.*

Supreme Court of the District of Columbia.

THURSDAY, *June 23rd*, 1904.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

* * * * * * *

BERTON O. WETMORE, Adm'r, &c., Pl'tff,
*vs.*
JAMES L. KARRICK, Defendant. } At Law. No. 46600.

Upon consideration of the demurrer of defendant filed herein by his attorneys, to the declaration, it is ordered that the said demurrer be and the same is hereby overruled. The defendant is hereby granted leave to have twenty days, within which to plead.

34 *Pleas, Affidavit of Defense.*

Filed July 13, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the Use of John F. McKay,
*vs.*
JAMES L. KARRICK. } At Law. No. 46600.

I.

The defendant for plea to the plaintiff's declaration says that there is no such record of a judgment as in the declaration set out.

II.

For a further plea to plaintiff's declaration the defendant says that heretofore on to wit the 12th day of June, 1899, the action brought by the plaintiff's intestate Charles H. Wetmore in the

superior court within and for Suffolk county, Massachusetts, mentioned in the declaration was dismissed and stricken off the docket of said court at a calling of said docket under order of the court, and that said dismissal became final under the rules of said court on the first Monday of July 1899; that said cause remained so dismissed from the said 12th day of June, 1899, for a long time thereafter, namely until the 18th day of October, 1900, which was for more than five terms or sittings of said court; that on to wit the 26th day of April, 1899, this defendant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, duly scheduling the debt due the said Charles H. Wetmore, which is the foundation of the said alleged judgment upon which this suit is based, and on to wit the 23rd day of June, 1899, while the said action was so stricken from the docket of the superior court of Suffolk county, Massachusetts, and was so finally dismissed by said court, the defendant was duly discharged in bankruptcy by the said district court of the United States for the district of Colorado from all debts provable in bankruptcy on the day of the filing of said petition; which debts included the debt due to said Wetmore; and that subsequently to the said discharge in bankruptcy, and while the said action in the superior court of Suffolk county, Massachusetts, stood dismissed as aforesaid, this defendant made inquiry of the clerk, of said superior court as to the status of said case, and was told that the same was dismissed and no longer pending against him; that relying upon said dismissal he took no step to suggest his bankruptcy in said suit, and that thereafter, to wit on the 18th day of October, 1900, as
35 shown by the record of said superior court, the said action was attempted to be restored to the docket of said court, without summons, citation or notice of any kind to this defendant, or to any one for him, and without his knowledge; and that in pursuance of such attempted restoration, to wit, on the 20th day of November, 1900, without notice of any kind to this defendant or to any one representing him, judgment was assumed to be rendered in said cause and that said judgment is the judgment here sued upon; that said judgment has no other foundation than said attempted restoration of the said cause to the docket of said superior court of Suffolk county, Massachusetts, under the facts and circumstances above set forth, all of which, including the rendition of such judgment, were made without the service of process or other notice on this defendant or upon any one for him, and without his knowledge, and without any jurisdiction of the court in the premises to render said judgment to his wrong and injury.

J. J. DARLINGTON,
MILLAN & SMITH,
*Attorneys for Defendant, James L. Karrick.*

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the use of John F. McKay,
*vs.*
JAMES L. KARRICK.
} At Law. No. 46600.

*Affidavit.*

DISTRICT OF COLUMBIA, *ss:*

James L. Karrick, being duly sworn, upon his oath says: I am defendant in the above entitled cause, in which John F. McKay is the use plaintiff and Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, is the nominal plaintiff; that I have a just defense to said suit, based upon the following facts: The suit brought by the plaintiff is founded upon an alleged judgment of the superior court of Suffolk county, Commonwealth of Massachusetts, which said alleged judgment arose out of the state of facts hereinafter detailed. On or about September 2, 1892, an action was brought by Charles H. Wetmore, the intestate of the nominal plaintiff, against affiant, in the said superior court of Suffolk county Massachusetts. Various steps were taken in said cause from time to time, as the suit proceeded, and on or about June 12, 1899, the action was dismissed by the judge presiding in said court, because the same was not prosecuted in accordance with the rules of said court made in pursuance of law; that under a rule of said court, in effect at the time, the said dismissal judgment became final on
36 the first Monday of the following month; that on or about April 26, 1899, affiant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, sitting at Denver in the State of Colorado, duly scheduling the indebtedness of the said Charles H. Wetmore which is the basis of the judgment here sued upon, and on or about the 23rd day of June, 1899 I was discharged in bankruptcy by a decree of said district court, from all claims provable under the act relating to bankruptcy, which existed on the said 26th day of April, 1899, of which claims the indebtedness due the said Charles H. Wetmore was one, it being a claim proper to be proved under said act; that thereafter and before the rendition of the said alleged judgment in said cause, affiant went to the city of Boston and to the court house therein and made inquiry of the clerk of the said court, or of one of his deputy clerks, as to the status of said suit and was informed that the cause was no longer pending and that it had been dismissed for want of prosecution; that thereafter, the said action was without citation summons or notice of any kind to affiant, or to any one representing him, restored to the docket of the said court, and on or about November 17, 1900, still without notice to affiant or any one repre-

senting him, a judgment was entered in the cause against affiant for the sum of $12,881.46 and the costs of suit; that it was not until after affiant was served with summons in this action in the District of Columbia, that he had any idea or intimation that the cause was pending against him in the superior court of Suffolk county, Massachusetts, or that it had been restored to the docket of said court; affiant says that the failure to notify him of the contemplated restoration of the case to the docket of the Massachusetts court and his utter ignorance that such action had been taken, worked upon him a great hardship, as had he been notified of any such purpose to restore the case to the docket he would have been able to protect himself by filing a suggestion of his discharge in bankruptcy, and would have done so; but by being kept in ignorance of such proposed action he had no opportunity to avail himself of the right to plead his bankruptcy as a complete bar to further proceedings in the cause.

JAMES L. KARRICK.

Subscribed and sworn to before me this 13th day of July, 1904.
[SEAL.] ALBERT E. SHOEMAKER,
*Notary Public, D. C.*

37 *Joinder in Issue.*

Filed July 23, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the Use of John F. McKay, Plaintiff,
*vs.*
JAMES L. KARRICK, Defendant. } At Law. No. 46600.

The plaintiff joins issue on the defendant's first plea to the plaintiff's declaration.

WM. L. FORD,
*Attorney for Plaintiff.*

*Demurrer.*

Filed October 22, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator, etc., to the Use of John F. McKay, Plaintiff.
*vs.*
JAMES L. KARRICK. } At Law. No. 46600.

The plaintiff says that the defendant's second plea is bad in substance.

WM. L. FORD,
*Attorney for Plaintiff.*

NOTE.—Among the points to be argued in support of the foregoing demurrer are:

First. That the jurisdiction of the Massachusetts court over the original suit and the parties thereto, and the power of said court to render judgment sued on herein, were in no way affected by the institution of the bankruptcy proceedings by the defendant, his adjudication as a bankrupt and his discharge prior to the rendition of said judgment by said court.

Second. That the defendant's discharge in bankruptcy having been granted before the rendition of the judgment sued on herein, does not constitute a defense, and cannot properly be pleaded as a defense, to this suit.

Third. That the defendant was not entitled to notice of the restoration of the original suit to the docket of the Massachusetts court, the said suit having been inadvertently dismissed
38 through a mistake of fact of said court, and restored to the docket by said court for reasons apparent of record, no new thing being brought upon the record.

WM. L. FORD,
*Attorney for Plaintiff.*

Supreme Court of the District of Columbia.

THURSDAY, *December* 29, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

BERTON O. WETMORE, Adm'r, Plaintiff,
*vs.*
JAMES L. KARRICK, Defendant. } At Law. No. 46600.

Upon hearing the demurrer of the plaintiff to the second plea of the defendant, it is considered that said demurrer be, and hereby is sustained.

*Opinion on Demurrer to 2nd Plea.*

Filed December 29, 1904.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator,
*vs.*
JAMES L. KARRICK, } #46600. Law.

In this case the declaration is based on an alleged judgment rendered in the superior court for the county of Suffolk in the State of Massachusetts. A certified copy of the judgment is filed as "Exhibit A," and made part of the declaration.

The defendant has filed two pleas, the first, *nul tiel record*, about which no question now arises: and second, a special plea to which the plaintiff has filed a demurrer.

By the second plea the defendant avers that on June 12th, 1899, the action brought by plaintiff's intestate in the said superior court, was dismissed and stricken off the docket at a calling of said docket under order of the court; and that, said dismissal became final under the rulings of said court, on the first Monday of July 1899; that said cause remained so dismissed until October 18th, 1900, more than five terms or sittings of the said court; that April 26th, 1899, the defendant filed his petition in bankruptcy in the district court of the United States for the district of Colorado, duly scheduling the debt due plaintiff's intes-
39 tate, Charles H. Wetmore, which is the foundation of said alleged judgment upon which this suit is based; and on June 23rd, 1899, while said action was so stricken from the docket, and was so finally dismissed, the defendant was duly discharged in bankruptcy by said court in Colorado, from all debts provable, including the said debt to said Wetmore; and thereafter, and while the said action in said superior court stood dismissed, the defendant made inquiry of the clerk of said court, and was told that the same was dismissed; and, relying upon said dismissal he took no steps to suggest his bankruptcy in said suit; and that thereafter, to wit, October 18th, 1900, the said action was attempted to be restored to the docket of said court, without summons, citation, or notice of any kind to him, or to any one for him, and without his knowledge; and in pursuance of such attempt, and without notice, judgment was assumed to be rendered in said cause on November 20th, 1900; and that said judgment is the judgment sued upon; and that said judgment has no other foundation than said attempted restoration of the said cause to the docket as above set forth; and was rendered without any jurisdiction of the said court in the premises.

The plaintiff states that among the points to be argued in support of the demurrer to this plea, are first, that jurisdiction of the Massachusetts court, and the power of said court to render the judgment sued on, were not affected by the alleged bankruptcy proceedings; second, that the defendant's discharge in bankruptcy, having been granted before the rendition of the judgment, the same cannot properly be pleaded as a defense to this action; and third, that the defendant was not entitled to notice of the restoration of the original suit to the docket of the Massachusetts court, because it had been inadvertently dismissed through the mistake of the court, and had been restored to the docket for reasons appearing on the face of the record, no new thing having been brought before the court.

It appears by the certified copy, or transcript from the proceedings of the Massachusetts court, filed with the declaration, that a jury trial had been had at the January sitting, 1894, and a verdict rendered in favor of the plaintiff; that a motion for a new trial was filed, based on several grounds, which was overruled on March 3d,

1894; and thereafter, the defendant alleged sundry exceptions to the rulings and opinions of the court in certain matters of law, which were reduced to writing, as on file; and the case was then continued until the April sitting, 1897, when the action was dismissed, on June 8th, but on June 10th, the dismissal was stricken out; and thereafter other proceedings were had, namely, one of the attorneys for the defendant filed a præcipe, withdrawing his appearance, and the case was continued from sitting to sitting to the April sitting, 1898, when on the 13th day of June, another of the attorneys for the defendant filed a præcipe, withdrawing his appearance; and
40 thereupon, the case was continued to the July sitting, 1898, when said exceptions, having been presented to the court, were disallowed, and the case was then continued from sitting to sitting, until June 12, 1899, when, on the call of the docket, the action was dismissed.

The record then states that at the October sitting, 1900, to wit, on October 18th, 1900, said order of dismissal was stricken out, and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered; and thereafterwards, on November 17th, 1900, the plaintiff moved for judgment on the verdict in said cause; and on November 20th, 1900, the motion was allowed, and judgment ordered on verdict; and judgment was thereupon entered for the recovery of $12,881.46, and costs of suit, taxed at $40.46; and also a judgment of condemnation, as to credits in the hands of the Mechanics national bank, trustee.

The attorneys for the defendant contend that the judgment of the said superior court, by reason of the facts stated in their second plea, is absolutely void; and their claim is based on the argument that the court lost jurisdiction over the person of the defendant on June 12th, 1899, when judgment of dismissal was pronounced. They admit that if there is only *error* in the judgment, it cannot be inquired into collaterally in this proceeding; but if it is *void*, it cannot be made the foundation of a suit, and their plea must therefore be sustained.

The principal question then is, do the facts set forth in the plea, show that the court had lost jurisdiction? or are the orders, setting aside the judgment of dismissal, and bringing the case forward, and finally entering judgment on the verdict, nullities, or merely irregularities?

The transcript shows that jurisdiction was properly obtained and held to June 12th, 1899, over both the subject matter of the suit, and the person of the defendant; and it appears that by some rule of practice, the said superior court, when no action had been taken in a pending case for one year, might enter an order, *pro forma*, dismissing the case; and it is claimed in the present case that the order of June 12th, 1899, was inadvertently entered by the court, because, at that time, a proper inspection of the record would have shown that there was no authority or power in the court to grant such

order, or judgment, by reason of such general rule, as the case was not one coming within the provisions of such rule.

The argument of counsel for plaintiff is, that such order of dismissal, being erroneous because of a failure of the court to properly inspect its own record, that it is within the power of the court at any time thereafter, to correct such erroneous judgment of dismissal, by an order vacating the same, without notice, and that jurisdiction was never lost by such erroneous order of dismissal.

In Freeman on Judgment, section 142, the author states that:

"Jurisdiction over a party being obtained, continues until judgment; and he must therefore take notice of all the proceedings
41 until that time. After judgment he is not regarded as always present and under control of the court. * * * Various motions may be made and proceedings taken after final judgment, either to correct it by amendment, to vacate it for some error or irregularity, to avoid it by writ of error or appeal, or to control process issued for its enforcement. Of these proceedings, unless they necessarily result from a mere inspection of the record, the parties are entitled to notice; but such notice may generally be given to their attorneys; who notwithstanding the entry of judgment are regarded as still representing them for the purpose of receiving notice of motions."

While the transcript in this case shows no service of notice, either on the defendant or his attorneys, the record does not state any permission or order of the court for the withdrawal of the attorneys, although each filed a præcipe stating that he did withdraw from the case; and in the absence of some record to the contrary, this court might presume that such request for withdrawal was never allowed by the court, and that said attorneys therefore remained of record in said case; and if it was necessary in this case that notice of the motion to vacate the order of dismissal, should be served on them, or on the defendant, this court might presume that such service of notice was made upon said attorneys.

It is argued, however, by plaintiff's attorney, that no service of notice whatever, was necessary, for the reason that the defendant must be charged with notice of what the record showed at the time the order of dismissal was entered; and must have known, constructively, if not actually, that such order was irregular at that time; and being charged with such notice, he must also know that the court, on inspection of its own record, and discovering such error, could properly vacate such order of dismissal, and reinstate the case, and allow it to proceed to final judgment. This being so, the final judgment, even if irregular, is not void, and is not subject to attack in this suit.

There can be little question of the power of the court to correct any mistake made by the clerk in keeping its records, whether during the same term that the mistake occurs, or at any subsequent term. There are a number of cases that hold that when it clearly appears what judgment should have been rendered as of course upon

the facts in the record, the court will assume to treat the failure to render such judgment as a mere clerical misprision, and will amend the judgment, or correct it in such way as to make it conform to that which should have been rendered upon the facts. (15 Enc. Pl. and Pr., 214.)

This, it is said, is a power inherent in the authority of every court having general jurisdiction; and this power may be exercised by the court at any time when the error is brought to its attention. Again, it is said as between the original parties there is no limitations as to the time in which amendments may be allowed; and no reason suggests itself why amendment of the record may not
42 be made at any time, so long as anything definite and certain remains to amend by. (17 Enc. Pl. and Pr., 913–920.)

In the case of Palmyra (12 Wheaton, 1) Mr. Justice Story, pronouncing the opinion of the court, uses this language, on page 9:

"Every court must be presumsd to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake." That was a case where the clerk of the circuit court had failed to transmit a perfect record, and for want of such record the court had dismissed the appeal, and at a subsequent term a correected transcript having been presented, which would, if present at first, have prevented the dismissal, the court set aside such dismissal and reinstated the appeal.

The court having the inherent power to pass such an order, can it be said that the failure to give notice to either of the parties of its intention to exercise the same, is necessary to the exercise thereof? The authorities are not uniform on this point. It is proper and right that such notice should be giveu in order to prevent any injustice, but failure to give such notice, it seems to me, cannot deprive the court of its inherent control of its own records so as to make them conform to its own ruling, or to its intended judgment.

For the foundation of all such general orders of dismissal, the court is obliged to rely upon the accuracy of its recording officer to keep it informed of the condition of the record; and if the court acts on the assumption that the record states one fact, when it actually states another, which would require a different order to judgment, it can, with apparent good reason, attribute the erroneous order made to the mistake of the clerk, either in recording the minutes, or in reading the record.

I am constrained to hold that the setting aside of the judgment of dismissal by the said superior court, on October 18th, 1900, and the subsequent entry of judgment on the verdict in this case, were not void proceedings, but at most, were irregularities, which cannot be questioned or corrected in a collateral proceeding at law, even if they could have been set aside, on timely motion, by the court making the same, or would be considered and corrected by a court of equity.

I am therefore disposed to sustain the demurrer to the second plea, and it is so ordered.

JOB BARNARD, *Justice.*

43 *Allowance of Special Appeal.*

Filed January 9, 1905.

Court of Appeals of the District of Columbia, January Term, 1905.

JAMES L. KARRICK, Petitioner,
*vs.*
BERTON O. WETMORE, Administrator, to Use of John F. McKay.
No. 204, Original Docket. Law. No. 46600.

On consideration of the petition of James L. Karrick for the allowance of a special appeal from an order of the supreme court of the District of Columbia, entered herein on the 29th day of December, 1904, it is now here ordered by the court, that said appeal be, and the same is hereby, allowed.

M. F. MORRIS,
SETH SHEPARD,
*Associate Justices.*

January 6, 1905.

A true copy.
Test:
HENRY W. HODGES, [SEAL.]
*Clerk of the Court of Appeals of the District of Columbia.*

In the Supreme Court of the District of Columbia.

JAMES L. KARRICK
*vs.*
BERTON O. WETMORE, Adm'r, to Use of JOHN F. McKAY.
At Law. No. 46600.

The President of the United States to Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia, on the 29th day of December, 1904, wherein James L. Karrick — appellant, and you are appellee, to show cause, if any there be, why

the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 9th day of January, in the year of our Lord one thousand nine hundred and five.

Seal Supreme Court of the District of Columbia. 44

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 9th day of January, 1905.

WM. L. FORD,
*Attorney for Appellee.*

(Endorsed:) (9.) No. 46600. Law. James L. Karrick *vs.* Berton O. Wetmore, administrator, &c. Citation. J. J. Darlington, Millan & Smith, attorneys for appellant.

*Memorandum.*

January 11, 1905.—Appeal bond filed.

*Directions for Preparation of Transcript.*

Filed January 20, 1905.

In the Supreme Court of the District of Columbia.

| | | |
|---|---|---|
| BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, *vs.* JAMES L. KARRICK. | Law. | No. 46600. |

The clerk of the supreme court of the District of Columbia:

In making up the transcript of the record to be transmitted to the Court of Appeals of the District of Columbia, on the special appeal of the defendant herein, you will include the following portions of the record, and none other, as necessary to the hearing of said appeal:

1. Original declaration and affidavit thereto attached, omitting the record of the judgment of the superior court of Suffolk county, Massachusetts, except as hereafter stated.

2. All that part of the record of the judgment of the superior court of Suffolk county, Massachusetts, filed with the declaration, from and including the finding of the jury on page 38, thereof to the end of said record.

3. The pleas of defendant, with affidavit thereto attached.
4. Demurrer to second plea.
5. Opinion of the court sustaining demurrer to the plea, and order thereon.
6. Order allowing special appeal.
7. Citation on appeal, with acknowledgment of service by plaintiff's attorney.
8. Note.—Appeal bond approved by the court, filed.
9. This memorandum and the acknowledgment of service thereof hereto attached.
10. The notice appended hereto to attorney for plaintiff of the parts of the record which you are to include in the transcript.

J. J. DARLINGTON,
MILLAN & SMITH,
*Attorneys for Defendant.*

Mr. William L. Ford, attorney for plaintiff:

Please take notice that we shall instruct the clerk of the supreme court of the District of Columbia to make up the transcript of the record in the above entitled cause, according to the above memorandum.

J. J. DARLINGTON,
MILLAN & SMITH,
*Attorneys for Defendant.*

I hereby acknowledge service of a copy of the foregoing memorandum.

WM. L. FORD,
*Attorney for Plaintiff.*

*Appellee's Notice to Clerk for Additional Parts.*

Filed January 20, 1905.

In the Supreme Court of the District of Columbia.

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| BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, *vs.* JAMES L. KARRICK. | At Law. No. 46600. |

To the clerk of the supreme court of the District of Columbia:

In addition to the parts of the record herein, heretofore designated by the defendant and appellant, which the appellant desires to be included in the transcript of the record, the plaintiff and appellee hereby designates the following parts of the record in this

cause which he deems necessary and material for the appeal herein; and you are hereby directed to include the same in the transcript of the record:

1. All of the record of the judgment of the superior court of Suffolk county, Massachusetts, filed with the declaration and made a part thereof.
2. Demurrer to the declaration.
3. Order of June 23, 1904, overruling the demurrer to the declaration.

WM. L. FORD,
*Attorney for Plaintiff and Appellee.*

Please take notice that I have this 20th day of January, 1905, filed with the clerk of said court a notice, of which the above is a copy, designating other parts of the record in said cause, which the plaintiff and appellee herein deems necessary and material for the appeal; and I have instructed said clerk to include such other parts in the transcript of the record to be prepared by him.

WM. L. FORD,
*Attorney for Plaintiff and Appellee.*

To Messrs. J. J. Darlington, and Millan & Smith, attorneys for defendant and appellant.

46 *Mandate.*

Filed May 5, 1905.

UNITED STATES OF AMERICA, *ss:*

SEAL. The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas, lately in the supreme court of the District of Columbia, before you, or some of you, in a cause between Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, plaintiff, and James L. Karrick, defendant, law, No. 46,600, wherein the order of the said supreme court entered in said cause on the 29th day of December, A. D. 1904, is in the following words, viz:

"Upon hearing the demurrer of the plaintiff to the second plea of the defendant, it is considered that said demurrer be, and hereby is sustained."

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the

act of Congress in such case made and provided fully and at large appears.

And whereas, in the present term of April, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

47 On consideration whereof, it is now here ordered and adjudged by this court that the order of the said supreme court in this cause be, and the same is hereby, reversed with costs; and that the said defendant James L. Karrick, recover against the said plaintiff sixty-nine dollars and fifty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said supreme court with directions to vacate such order, and to enter an order overruling the plaintiff's demurrer, with leave to the plaintiff to plead over as he may be advised upon such terms as to the court may seem proper; and for such further proceedings therein, if any, as may be right and just and according to law, and not inconsistent with the opinion of this court.

APRIL 17, 1905.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 5th day of May, in the year of our Lord one thousand nine hundred and five.

HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

*Costs of Defendant.*

| | |
|---|---|
| Clerk | $12.00 |
| Attorney | 5.00 |
| Printing | |
| Record | 52.50 |
| | $69.50 |
| Record | 15.65 |
| | $85.15 |

48 *Final Judgment.*

Supreme Court of the District of Columbia.

TUESDAY, *May* 16, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard presiding.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, Plaintiff, v. JAMES L. KARRICK, Defendant. } At Law. No. 46600.

Now come here as well the plaintiff by his attorney, William L. Ford, as the defendant by his attorneys Millan & Smith, and in pursuance of the mandate of the Court of Appeals it is considered that the order of this court of December 29th, 1904, be, and the same hereby is, vacated; whereupon it is considered that the demurrer of the plaintiff to the second plea of the defendant be, and the same is hereby overruled; thereupon the plaintiff, by his said attorney, elects to stand upon said demurrer, and upon motion of the defendant, judgment is ordered: Therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff his costs of suit to be taxed by the clerk, including $85.15 costs of appeal adjudged by the Court of Appeals, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals; and leave is granted him to deposit with the clerk of this court the sum of fifty dollars in lieu of an appeal bond.

49 *Memorandum.*

June 8, 1905.—$50. deposited by appellant in lieu of appeal bond.

*Directions for Preparation of Record.*

Filed June 9, 1905.

In the Supreme Court of the District of Columbia.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of John F. McKay, vs. JAMES L. KARRICK. } At Law. No. 46600.

To the clerk of the supreme court of the District of Columbia:

In making up the transcript of the record to be transmitted to the Court of Appeals of the District of Columbia, on appeal by the

plaintiff from the final judgment of May 17, 1905, for the defendant herein, you will include the following portions of the record, and none other, as necessary to the hearing of said appeal:

1. The entire record as designated by the appellant and the appellee in this case on the former appeal (special) herein.
2. Mandate of the Court of Appeals, filed May 5, 1905.
3. The judgment and order of May 17, 1905 herein.

50 4. Noting of appeal from said final judgment in open court.

5. NOTE.—Deposit of $50 in money in lieu of appeal bond.

WM. L. FORD,
*Attorney for Plaintiff.*

To J. J. Darlington and Millan & Smith, attorneys for defendant:

Please take notice that I shall instruct the clerk of the supreme court of the District of Columbia to make up the transcript of the record in the above-entitled cause according to the above memorandum.

WM. L. FORD,
*Attorney for Plaintiff.*

We hereby acknowledge service of a copy of the foregoing memorandum and reserve all rights.

MILLAN & SMITH,
*Attorneys for Defendant.*

51 Supreme Court of the District of Columbia.

MONDAY, *July 3rd*, 1905.

Session resumed, Hon. Thos. H. Anderson, associate justice, presiding.

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|---|---|---|
| BERTON O. WETMORE, Adm'r, to the Use of John F. McKay, Plaintiff, vs. JAMES L. KARRICK, Defendant. | At Law. | No. 46600. |

It appearing to the court on this 3rd. day of July 1905, that the business in the office of the clerk is so congested that the record in this cause cannot be prepared within the time allowed, it is ordered that said time within which to file the record in the Court of Appeals be, and hereby is, extended until the 1st. day of September, 1905.

52 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 51, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 46,600, at law, wherein Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, is plaintiff, and James L. Karrick is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of August, A. D. 1905.

J. R. YOUNG, *Clerk*.
By FRED. C. O'CONNELL, *Ass't Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1601. Berton O. Wetmore, administrator, &c., appellant, *vs.* James L. Karrick. Court of Appeals, District of Columbia. Filed Aug. 31, 1905. Henry W. Hodges, clerk.

TUESDAY, *October* 10*th*, 1905.

No. 1601.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

*vs.*

JAMES L. KARRICK.

The above entitled cause was submitted to the consideration of the Court on the printed record filed herein by Mr. W. L. Ford, attorney for the appellant.

No. 1601.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

*vs.*

JAMES L. KARRICK.

*(Opinion per Curiam.)*

Opinion.

A former appeal was granted in this case from an order sustaining a demurrer to the defendant's special plea, and that order was reversed and the cause remanded for further proceedings not inconsistent with the opinion then delivered. 32 W. L. R. 435; S. C. 25 App. D. C.

Upon such further proceeding the plaintiff elected to stand upon his said demurrer, and final judgment was thereupon rendered for the defendant. From that judgment the plaintiff has prosecuted this appeal. Having been rendered in accordance with the mandate and opinion of this Court, the judgment will be affirmed with costs; and it is so ordered.

*Per Curiam.*

Affirmed.

No. 1523.

JAMES L. KARRICK, Appellant,

*vs.*

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY.

*Opinion.*

(Mr. Justice MORRIS delivered the opinion of the Court.)

A suit between the parties to the controversy now before us was here on a former appeal and seems to have involved the same subject-matter. It was held, in substance, that the suit, as it then

stood, could not be maintained. 22 D. C. App. 487. That suit seems to have been thereupon abandoned, and the present proceedings were instituted wherein very different questions are raised.

The suit is one at common law, instituted in the Supreme Court of the District of Columbia, upon a judgment recovered by the appellee as plaintiff against the appellant as defendant in the Superior Court for the county of Suffolk, in the State of Massachusetts, on November 20, 1900, for the sum of $12,881.46, besides costs, which is alleged in the declaration to remain unsatisfied. With the declaration was filed a copy of the record of the court in Massachusetts, and as the validity of this record as a basis for the present suit is here in question, it is necessary that its condition should to some extent be stated.

The suit in Massachusetts, which seems to have grown out of some building contracts between the appellant and Charles H. Wetmore, deceased, the intestate of the plaintiff therein, was commenced in the year 1892 by attachment proceedings. The defendant, however, the present appellant, subsequently appeared by attorney and pleaded to the declaration. Among the pleas was one of set-off. There was then a trial by jury, who were directed to return a special verdict upon four special interrogatories framed for them. The answers of the jury to these interrogatories seem to have been unfavorable to the defendant in the cause. And yet the defendant came in and moved for judgment. The record fails to disclose what action, if any, was taken on this motion. But the next step seems to have been a motion by the defendant to set aside the special verdict, which was allowed. Thereupon the plaintiff appears to have amended his declaration by filing an additional count, and the parties went to trial again before a jury. There was another special verdict, and also a general verdict in favor of the plaintiff in the case for the sum of $9,169.39.

A motion for a new trial was made and overruled, and then the defendant, according to the record, filed "sundry exceptions to the ruling and opinion of the court in certain matters of law, which were reduced to writing." When these exceptions were filed does not appear; but presumably they were filed on or before March 5, 1894, which was the time assigned within which they were to be filed.

Nothing further seems to have been done for upwards of four years. Then, on June 8, 1897, "at a calling of the docket under the general order of court the action was dismissed." Two days afterwards, on June 10, 1897, the order of dismissal was stricken out and the cause restored to the calendar. A very short time after this, on June 28, 1897, the attorney for the defendant entered an order withdrawing his appearance. There would seem to have been a substitution of attorneys, for the next step that appears in the record is on June 13, 1898, when another attorney, whose name appears nowhere else in the record, also withdrew his appearance for the defendant. Immediately thereafter appears the following entry:

"Thence the case was continued to the July sitting, 1898, when said exceptions, having been presented to the court, were disallowed

as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the questions of law raised by the defendant's exceptions.

"Thence the case was continued from sitting to sitting into the April sitting, 1899, when on the 12th day of June, 1899, at a calling of the docket under the general order of court, said action was dismissed.

"And now at this present October sitting, 1900, to wit, on the 18th day of said October, 1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered."

Then, on November 17, 1900, there was a motion by the plaintiff for the entry of judgment on the verdict of the jury; and judgment was accordingly entered on November 20, 1900, against the defendant for the sum of $12,881.46 and costs of suit, with award of execution.

It is upon this record that the present proceedings were instituted in this District.

The defendant filed two pleas: (1) The general issue of *nul tiel record;* and (2) a special plea, wherein he set- forth that, on June 12, 1899, the cause against him in Massachusetts was dismissed; that, under the rules of the court, that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms of the court, until October 18, 1900; that in the meantime, on April 29, 1899, the defendant filed his petition in bankruptcy in the District Court of the United States for the District of Colorado, in which in his schedule he enumerated the debt due to said Charles H. Wetmore, and was by the said district court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, wherein was included the debt here sued on; that subsequently to his discharge in bankruptcy, and while the suit in Massachusetts stood dismissed as aforesaid, he made inquiry of the clerk of that court as to the condition of the suit and was informed that the same was no longer pending; that, relying upon this statement, he took no steps in that court to suggest his discharge in bankruptcy; that the action in Massachusetts was sought to be restored to the docket of the court in that State, "*without summons, citation, or notice* of any kind to the defendant, or to any one for him, and without his knowledge;" and that the court had no jurisdiction in the premises to render such judgment.

There was joinder of issue by the plaintiff on the defendant's first plea, and a demurrer to the second; and the demurrer was sustained by the court below. From the order sustaining the demurrer the defendant has been allowed a special appeal to this court; and the cause is now before us on this special appeal.

The question in this case is whether a judgment of dismissal, on its face apparently a final disposition of the cause in which it was rendered, can, after the lapse of five terms of the court by which it was rendered, be stricken out without notice to the defendant, and a judgment rendered in the place of it, equally without

notice to the defendant, in favor of the plaintiff and for the full amount of the latter's claim. And this question, we think, on the plainest principles of justice, whatever may have been the merit of the plaintiff's claim, must be resolved in the negative.

The right to be heard is a fundamental right of every litigant under our system of jurisprudence, and under every system of jurisprudence worthy of the name; and usually it is not denied even in the lawless codes of the most lawless savages; and in the right to be heard the first element is that of notice. The service of process, in other words, notice, is the essential prerequisite to the exercise of jurisdiction by any court. Indeed, it may be said that, strictly speaking, not a single step from the beginning to the end of a legal controversy can be taken without notice to the opposing party; although, of necessity, the notice in many instances is constructive, rather than actual, and the absence of it is an irregularity rather than a defect that would operate to cause a failure of jurisdiction. These are fundamental principles of the law which can not reasonably be controverted; and yet, if we give effect to the contentions of the appellee in the case now before us, it can not be without serious derogation of those principles.

As appears from the record of the court of Massachusetts the appellant here was the defendant in a suit in that court. That suit, after many vicissitudes, resulted in a judgment of dismissal, upon the ground that there had been no prosecution of the cause for twelve months previously thereto, which was a good ground for dismissal under the rules and practice of the court. There would appear, however, to have been some mistake in the matter, and that there had been some action within the previous year. This was on June 12, 1899. Before this order of dismissal, and while the suit was in a state of abeyance, the appellant had instituted proceedings in bankruptcy in the District Court of the United States for the District of Colorado (on April 26, 1899), for the purpose of being discharged from his debts under the bankruptcy laws of the United States, and had in his schedule of indebtedness enumerated the claim for the enforcement of which the suit in Massachusetts had been prosecuted. On June 23, 1899, he received his discharge in bankruptcy. This was seventeen days after the dismissal of the suit in Massachusetts, of which he seems to have had no notice. But immediately after his discharge, with the view of pleading such discharge as a bar to further proceedings in the Massachusetts court, he applied to the clerk of that court to ascertain the condition of the suit there, and was informed, and very truly informed, that there was no suit then pending in that court against him, and that the suit which had been pending against him had been dismissed.

Now, whatever may have been the cause of the dismissal of that suit, whether it was due to a mistake of fact or to a mistake of law, or whatever was the reason for it, as long as it was not done by the fraud of the appellant, which is not pretended, the appellant, under the circumstances, had the right to rely upon it and to rest secure upon its validity. If the dismissal was improper it was not for him to take any steps to correct the impropriety. There was no obliga-

tion upon him to move to have the dismissal stricken out, even to give him an opportunity to plead his discharge in bankruptcy. He was entitled to rest upon the record as he found it and to assume that the cause was at an end. And even if he was chargeable with a knowledge of the infirmity of the judgment of dismissal as having been based upon a mistake of fact, he was entitled to assume that he would be duly notified of any attempt to correct the error. It would certainly be most unreasonable to hold that he was bound to incessant vigilance to see that no step was taken in the matter without his cognizance of the fact. And when it is remembered that, whatever may have been the merit of the original claim against him, and whatever may have been the demerit of his original defense, he had by his discharge in bankruptcy become entitled to a *prima facie* perfect defense which would or at least might have precluded the entry of any judgment against him, as would a plea of payment *puis darein continuance,* if supported by proof, it will be apparent what great injustice could be and was done in this cause by the failure of notice to him of an attempt to convert a judgment in his favor to a judgment against him.

It seems to be conceded that, under the circumstances, only in the suit in Massachusetts could the discharge in bankruptcy have been properly pleaded. It can not be pleaded in the proceedings in this District, for the reason that what purports to be the final judgment of the court in Massachusetts, upon which the present proceedings are based, was rendered after the discharge in bankruptcy. *Dimock v. Revere Copper Company,* 117 U. S. 559. But the appellant proposed to plead it, where it was properly pleadable, in the original suit in Massachusetts; and it may be assumed that he would have done so, if the opportunity to do so had been afforded to him by proper notice that the judgment of dismissal would be stricken out. It seems to be assumed by the appellee that the appellant had lost his right to plead his discharge in bankruptcy by his failure, upon the filing of his petition in bankruptcy, to ask for a stay of proceedings in the Massachusetts court. But this proposition is wholly untenable. It was his privilege to ask for a stay of proceedings, if he so desired; but if he assumed that no judgment would be rendered in that court before his discharge in bankruptcy, and that he would have ample time before the final judgment therein to introduce into the suit the defense of his discharge, he was at perfect liberty to do so. In fact, the proceedings in the Massachusetts court seem to have been stayed during nearly the whole time of the proceedings in bankruptcy and for about two years previously thereto; for the record fails to show that anything whatever was done in the cause in the Massachusetts court between June 10, 1897, when a previous judgment of dismissal was stricken out, and June 12, 1899, when the second judgment of dismissal was entered, except the withdrawal of the defendant's attorneys and the disallowance of the defendant's exceptions at the July term of 1898. Moreover, the only action taken by the court in Massachusetts during the pendency of the bankruptcy proceedings, that

is, between April 26, 1899, and June 23, 1899, was the very dismissal complained of by the appellee, on June 12, 1899, which was a most effectual stay of proceedings.

It is plainly apparent, therefore, from the record before us that the appellant was entitled at any time after June 23, 1899, to go into the court in Massachusetts and there plead his discharge in bankruptcy as a bar to any recovery there against him, if any suit was then pending; that there was no suit then pending in that court; that, when it was sought to revive that suit by striking out the judgment of dismissal, it would have been competent for him then to plead his discharge, if he had the opportunity; that he was deprived of that opportunity by the failure to give him notice, and that thereby he lost a most valuable right. No case can well be supposed which more forcibly illustrates the propriety of giving notice or the gross injustice that may follow from failure to give it. Assuredly it can not be that the law will sanction such a proceeding.

We need not decide the question whether the court in Massachusetts had the authority, after the lapse of five terms of that court, to strike out a judgment of dismissal and to enter a final judgment in favor of the plaintiff. We will assume that it had full power and authority so to do under its rules of practice and under the laws of that State. The full force and credit required by our Federal Constitution and the comity that exists between the States to be given by the courts of one State to the judgments and decrees of the courts of other States, we are disposed to accord even to a greater extent than we might do to the courts of our own jurisdiction, for the reason that many concessions are to be made to difference of practice and difference of statutory law; but in no court of any jurisdiction can we recognize the authority to render judgment against individual citizens without due notice to them, and it is conceded that in the present instance there was no notice of any kind to the appellant or to any one for him of the intended action of the court. It is alleged in the appellant's plea, and it is admitted by the demurrer, that there was absolutely no notice of any kind to the appellant.

In order to maintain the validity of the judgment upon which he sues, the appellee is driven to the necessity of arguing that no notice was required, that the parties were in court, and that the court had jurisdiction over them and over the subject-matter. But the plain answer to this is that the defendant was not in court. He had been dismissed from court without day and was no longer required to take notice of its proceedings. It is absurd to argue that he must be regarded as cognizant of the mistake under which the judgment of dismissal was rendered; that he must be held to know that such judgment was liable to be stricken out; and that, therefore, he was constructively retained in court for an indefinite time, and until the plaintiff thought proper to move in the matter and have the judgment stricken out. This contention, if sustained, would render judgments of dismissal useless and of no value; and yet undoubtedly a judgment of dismissal is as good as any other judg-

ment as long as it stands, and parties are entitled to act upon the faith of it as a valid judgment. It is true that judgments of dismissal, not being rendered upon the merits, are liable to be stricken out; and yet they are final judgments and may terminate the litigation as well as any other judgment. It may not be disturbed any more than a judgment upon the merits after the lapse of the term at which it was rendered. *Bronson v. Schulten,* 104 U. S. 410; *Phillips v. Negley,* 117 U. S. 665.

In these two cases it is shown that there are certain exceptions to the general rule, which may be reduced to three classes: (1) Cases of clerical misprision, as when the judgment rendered was not entered correctly by the clerk; (2) cases of mistakes of fact, such as that one of the parties to the judgment had died before its rendition, or was an infant, or a *feme covert,* or the like, which errors were formerly corrected at the common law by writ of error *coram nobis;* (3) cases in which a bill in equity will lie to prevent the execution of an erroneous or inequitable judgment.

Now here there was no clerical misprision. The judgment entered was the judgment actually rendered and which was intended to be rendered. It is true there was a mistake of fact, as we may assume, but that does not make the judgment a clerical error, but an erroneous judgment, such as might result from a mistaken understanding of testimony. It falls, if at all, within one of the other two classes. But this does not help the case of the appellee. For, while in modern practice, the writ of error *coram nobis* has fallen into disuse, and relief is afforded upon motion supported by affidavits, and while under statutory provisions, as in Massachusetts, relief by motion is also to a limited extent substituted for bill in equity, yet, as both the writ of error *coram nobis* and bill in equity can not be entertained without service of process, so a motion to serve the same purpose must likewise be based upon notice. Notice is as requisite to jurisdiction in the one case as in the other, and the fact that the method of relief is more summary does not in any manner diminish the necessity for its requirement.

Certain cases are cited on behalf of the appellee as tending to support his proposition that a court may, without notice to the party to be affected thereby, set aside a judgment after the term at which it was rendered and enter a new and radically different judgment. These are *Walden v. Craig's Heirs,* 14 Pet. 147; *Odell v. Reynolds,* 70 Fed. Rep. 656; *Emery v. Whitwell,* 6 Mich. 474; *Nowe v. Todd,* 83 Mo. 601; *Mann v. Schroerr,* 50 Mo. 306; *Davis v. Wade,* 58 Mo. App. 641; *Emery v. Berry,* 28 N. H. 473; Block on Judgments, sec. 134; Freeman on Judgments, sec. 142; 17 Amer. and English Encyclopedia of Law (2d ed.), 823. But upon careful examination of these authorities it will be found that in no one of them was the case presented which is now before us, and that the mistakes corrected were mistakes of a clerical nature, apparent on the record.

The case of *Walden v. Craig's Heirs,* 14 Pet. 147, merely held that parties were, under the law of the State of Kentucky, to be regarded as continuing in court for the purpose of carrying a judgment into effect. But this is a very different proposition from that

of wholly invalidating a judgment and converting it into an adverse decision.

The case of Odell *v.* Reynolds is apparently more to the point, but only apparently so. A very brief statement of it will be amply sufficient, notwithstanding the somewhat broad language of the opinion, to show that it is no authority whatever for the proposition advanced on behalf of the appellee in the present case.

In that case a judgment by confession had been entered in the Superior Court of Cook County, in the State of Illinois, for the sum of $25,000, on account of several promissory notes held by the plaintiff and aggregating that amount. The entry of the judgment was on April 18, 1892, and the confession purported to be by a certain person named as "the attorney in fact" for the defendant, and to be an account of "the note filed in the case." There were two defects in the judgment. One was to the effect that the statute law of Illinois forbade the appearance of any one as an attorney in fact to confess judgment, unless he was an attorney at law. The person who had confessed the judgment was in fact an attorney at law; but that fact did not appear affirmatively upon the record, although it was ascertainable from the rolls of the court. Another defect was that the word *"note"* was used in the singular number, indicating that only one note for the sum of $25,000 had been filed, while in fact several notes had been filed of the aggregate amount of $25,000. On February 26, 1893, after the term had expired at which the judgment had been rendered, motion was made to correct it. Whether this motion was made upon notice or without it, the statement of the case does not show. From the opinion in the case of *Odell v. Reynolds* it may be conjectured that it was without notice. The motion was allowed, and the judgment was corrected. Subsequently suit was instituted upon it in the Federal District Court; and there were pleas filed by the defendant, one of them setting forth the insanity of the defendant at the time the judgment was rendered, another to the effect that the judgment had been altered without authority on the part of the court of Cook County so to do, after the lapse of the term. This suit found its way to the Circuit Court of Appeals for the Sixth Circuit, and that court sustained the authority of the Cook County court to correct its judgment.

Assuredly there is nothing in the facts of this case that would justify the contention of the appellee in the case now before us. In that case there was no substantial change whatever in the new judgment that was entered. Indeed, from our standpoint the changes might be regarded as wholly superfluous. The original judgment was against the defendant for $25,000; the corrected judgment was one against the defendant for $25,000. It was of no real consequence whether the claim was upon one note for $25,000 or upon several notes aggregating that sum, or whether it appeared upon the record that the attorney in fact was an attorney at law; and we fail to see how, upon the authority of such a case as this, the action can be vindicated which would convert, without notice

to the party to be affected thereby, a judgment of dismissal in his favor to a judgment against him for upwards of $12,000.

It is upon the reasoning of the case, however, and not upon the facts of it, that the appellee seeks to justify himself; but no more upon the reasoning than upon the facts can he support his contention, for the opinion of the court distinctly and explicitly states the limitations upon the course of procedure which it sanctioned, and which no doubt is entirely correct within these limitations. As the case of *Odell v. Reynolds* is the only case that has been cited which treats this subject at any length from the apparent standpoint of the appellee, and the subject is a grave one in the administration of justice, we are at pains to transcribe so much of the opinion in that case as seems to be pertinent to the issue before us. The court there said:

"The first question to which we shall give attention arises upon the objection of the defendant to the entry made by the Superior Court of Cook County, on the 26th day of February, 1893, in correction and amendment of the judgment which it had rendered on the 18th day of April, 1892. The grounds of that objection, as stated my counsel for defendant in error in argument, are: (1) That the court had no power to make the order, for the reason that the term at which the judgment was rendered had expired, and (2) that the order was made without any notice to the defendant of the proposed action and without his knowledge. * * * On the contrary, it is a power inherent in the authority of every court having general jurisdiction to correct errors in the making up of its records whereby they fail to express the truth in regard to its proceedings. And the power may be exercised by the court at any time when the error is brought to its attention, *and no injury is likely to happen to the parties or other persons by its exercise.* No doubt such power should be cautiously and discreetly used, but that it exists is well established by authority. It is the settled doctrine of the English courts, and in most of the courts of this country. * * * In the present case counsel for defendant submits as a vital objection to the action of the Illinois court in making the entry for correction of February 26, 1893, that 'to make that finding and to insert it in the judgment *nunc pro tunc* was to materially add to and substantially modify the judgment that was rendered as the prior term, for it involved the very character and scope of the agency to which alone Reynolds had committed the right to enter his appearance and confess judgment.' But the consequences of the correction is no test of the power of the court to make it. In Wight's case, just cited, the effect of the entry was to annihilate the whole foundation on which his petition rested. * * * Sometimes the propriety of such action exists in cases where the correction may be made upon that which appears in the record itself and is necessary to make it consistent and harmonious one part with another. In other cases it is necessary in the interest of justice to act upon matters not appearing from the record; for example, things resting in the recollection of the judge, or evidence

adduced *aliunde*. In the former case notice to parties is not nece sary. No new thing is brought upon the record. The court, fo the clearer and more accurate expression of its final action, mold into form that which is fairly and reasonably deducible from th whole record, taken together. There is nothing to litigate. N *right is substantially affected.* (Freeman on Judgments, sec. 72 1 Black on Judgments, sec. 164; *Emery v. Whitwell, ubi supra Mathesen's Adm. v. Grant,* 2 How. 263.) In the latter case the que tion of the necessity of notice may depend upon the source fro which the evidence comes upon which the action is to be take If it is the recollection of the court, it is doubtful whether noti is required, for the reason that it is not open to contest. At a events, it would seem upon the authorities that corrections of th record made by the court upon its own recollection would not b collaterally assailable, though made without notice."

We have underlined certain phrases in this opinion which clearl show the limitation within which it was intended to be restricte The opinion is plainly unexceptionable as applied to the facts o the case which was before the court; but it is equally plain that th ruling of the court was not intended to extend to cases, *where an right was to be substantially affected, or where any of the parti were likely to be injured by the proposed correction.* Now it i difficult to conceive of any case where a right was more substantiall affected, or where one of the parties to the cause was more seriousl injured, than the case now before us.

The case of Wight, 134 U. S. 136, is also cited by the appelle as sustaining his contention that he was entitled to proceed witho notice. But we fail to see wherein that case supports him. Ther it appeared that one Wight, who petitioned to be released on *habea corpus*, had been indicted and convicted in a district court of th United States for a criminal offense. He made a motion for a ne trial and in arrest of judgment, and at that point the district cou certified the cause to the circuit court. The circuit court overrule both motions, but failed to enter any order to remand the caus to the district court. It is not entirely clear from the record whethe the failure to enter such an order was due to oversight on the par of the clerk to note on his record the verbal order that may hav been actually rendered, or resulted from the failure of the cou at the time to make any order. But on the same day on whic the circuit court denied the motions of the defendant, the distric court again took up the case, entered an order overruling the sam motions, and putting upon record its opinion that the case ha been improvidently and without authority certified to the circui court, vacated the order of certification, and thereupon proceede to pronounce sentence upon the defendant. The writ of *habea corpus* was then sued out, and while that writ was pending it wa discovered that, as already stated, no entry had been made remand ing the cause from the circuit court to the district court. There upon the circuit court corrected its record so as to provide for suc an entry. The petitioner's whole case was based upon the absence of any such entry, and the consequent absence, as claimed, of juris

diction on the part of the district court to proceed with the cause. The Supreme Court of the United States held that the correction of the record was lawful.

Now, it is quite apparent from the statement of this case, in which the district judge, who held the district court, also sat with the circuit judge in the circuit court, and both courts were held at the same time in the same court house, that there was an *actual* remanding of the cause by the circuit to the district court; and whether the failure to enter a formal order to that effect was due to misprision of the clerk, who no doubt was the same for both courts, or, as is more likely from the circumstances, was the result of oversight on the part of the judges, or of the view evidently entertained by them, although not entertained, it would seem, by the Supreme Court of the United States, that the order of certification from the district to the circuit court was without authority of law and void; the failure to enter an order for remanding the cause was not a jurisdictional, but a clerical matter. It was intended simply to make a record of that which was actually done by the court, and it did not at all materially alter the nature of the judgment that was rendered. The case of Wight, therefore, is no authority for the position of the appellee in the case now before us.

Various other cases there are of a similar character, in which there has been a relaxation of the rigid rules of the common law that judgments of a court of general jurisdiction may not be altered in any manner after the lapse of the term at which they were rendered. But it is unnecessary to consider them. The relaxation has been only to correct clerical errors, or to fill up a gap in the record when there was actually no gap in the action of the court, or in some way to make the record consistent with itself. In other words, the power of correction remaining in the court would seem to be rather of matters leading up to the judgment itself. But assuming that a judgment itself might be altered in a substantial manner, by way of correction or amendment, after the lapse of the term at which it has been rendered, we find no adjudicated case, and we know of no rule of law or of reason that would justify a substantial alteration of such judgment without notice to the person to be affected thereby. Such notice is jurisdictional, and the failure to give it is not a mere irregularity to be corrected by action in the same court in the case itself, or by appeal to an appellate tribunal. Evidently in the case before us, when the defendant was advised of the action taken against him, it was too late for him to enforce his right by application to that court or by appeal, and it is absurd that he should be driven to such mode of enforcing his right. He had been dismissed from court, and he could not have been called back except by notice, which it is conceded was not given.

From what we have said it follows in our opinion that the action of the Superior Court of Suffolk County, in the State of Massachusetts, in striking out the judgment of June 12, 1899, dismissing the suit between the parties to these proceedings, and rendering on November 20, 1900, in its place and stead a new and radically different judgment for the plaintiff and against the defendant for

the sum of $12,881.46, without notice to the defendant, was without jurisdiction and was null and void. Consequently we think that it was error in the trial court to sustain the demurrer of the plaintiff to the appellant's second plea, and that the demurrer should have been overruled.

The order appealed from will be reversed, with costs; and the cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate such order, and to enter an order overruling the plaintiff's demurrer, with leave to the plaintiff to plead over as he may be advised upon such terms as to the court may seem proper; and for such further proceedings therein, if any, as may be right and just and according to law, and not inconsistent with this opinion. And it is so ordered.

Reversed.

THURSDAY, *October 12th, A. D.* 1905.

No. 1601. October Term, 1905.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

*vs.*

JAMES L. KARRICK.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby affirmed with costs.

*Per Curiam.*

October 12, 1905.

WEDNESDAY, *October 18th, A. D.* 1905.

No. 1601.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, Deceased, to the Use of JOHN F. MCKAY, Appellant,

*vs.*

JAMES L. KARRICK.

On motion of Mr. W. L. Ford, attorney for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue. And it is further ordered that said appellant deposit with the clerk the sum of one hundred dollars in lieu of bond.

*Memorandum.*

October 25, 1905.—One hundred dollars deposited with the clerk, for costs, in lieu of bond.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you, or some of you, between Berton O. Wetmore, administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, appellant, and James L. Karrick, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinct and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of October, in the year of our Lord one thousand nine hundred and five.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals*
*of the District of Columbia.*

Allowed by

——— ———.

UNITED STATES OF AMERICA, *ss:*

To James L. Karrick, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Berton O. Wetmore, administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected,

and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 25th day of October, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
*Chief Justice of the Court of Appeals of the District of Columbia.*

October 25, 1905.

Service accepted.
J. J. DARLINGTON,
*Of Counsel for Defendant in Error.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 25, 1905. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

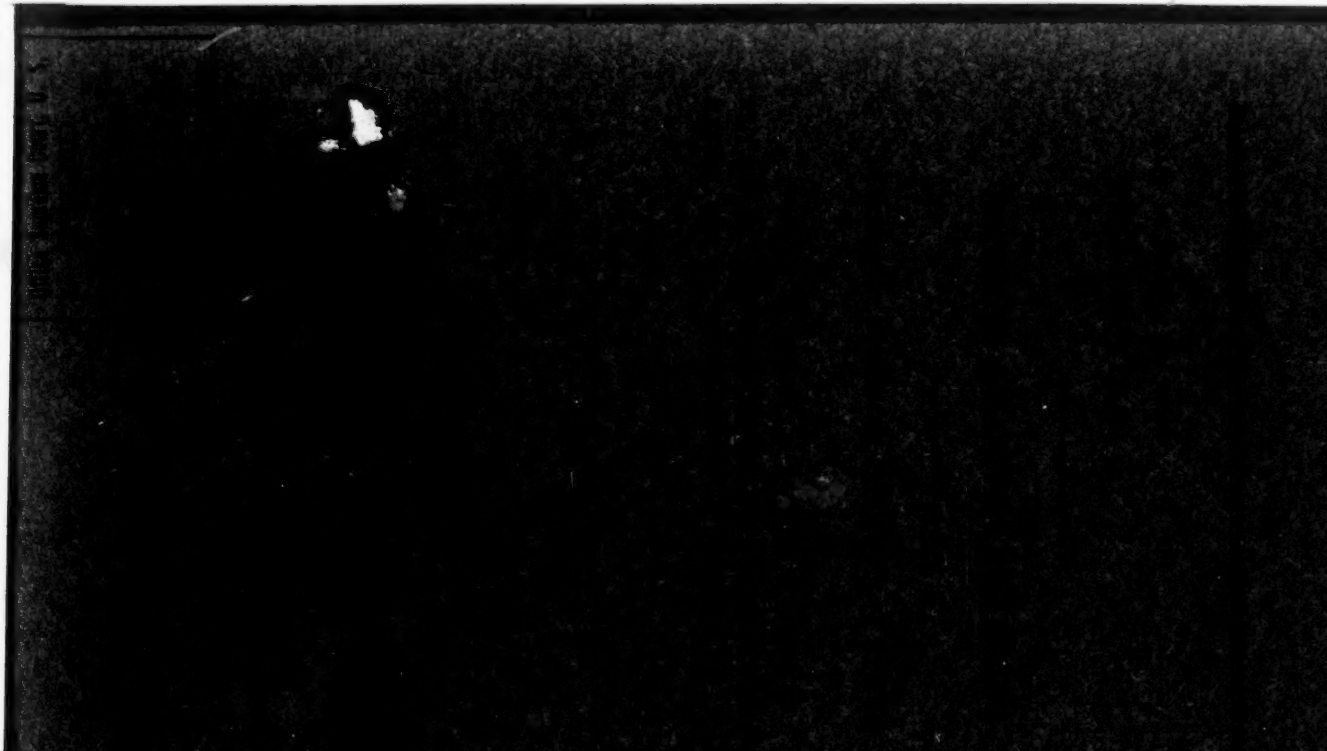
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 60 inclusive contain a true copy of the record and proceedings in said Court of Appeals in the case of Berton O. Wetmore, administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, appellant, *vs.* James L. Karrick No. 1601, October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of October A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: File No. 19,952. District of Columbia Court of Appeals. Term No. 144. Berton O. Wetmore, administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, plaintiff in error, *vs.* James L. Karrick. Filed November 3d, 1905. File No. 19,952.



# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 144.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, Plaintiff in Error,

*vs.*

JAMES L. KARRICK, Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of the Case.

This case comes before this court on a writ of error to the Court of Appeals of the District of Columbia, to review a judgment of said Court of Appeals which affirmed a judgment of the Supreme Court of the District of Columbia, entered for the defendant, on the overruling of a demurrer to the defendant's second plea, in an action at law founded on a Massachusetts judgment.

The suit, as indicated, is one at law, and was instituted on December 1, 1903, in the Supreme Court of the District of Columbia, upon a judgment recovered by the intestate of the plaintiff in error against the defendant in error, in the Superior Court for the County of Suffolk, in the State of Massachusetts, on November 20, 1900, for the sum of $12,881.46, besides costs, which is alleged in the declaration to remain unsatisfied. With the declaration was filed a properly authenticated copy of the record of the court in Massachusetts, and made a part thereof (R., 2).

The suit in Massachusetts, grew out of some building contracts between the defendant in error and Charles H Wetmore, deceased, the intestate of the plaintiff in error herein, and was commenced in the year 1892. *The defendant was personally served with process* (R., 15). He also appeared by attorney and pleaded to the declaration (R., 16 and 17). There was a trial by jury, who were directed to return a special verdict upon four special interrogations framed for them. The answers of the jury were against the defendant (R., 23 and 24). The defendant moved to set aside the special verdict, which motion was allowed (R., 24). The plaintiff thereupon amended his declaration by filing an additional count, and the parties went to trial again before a jury (R., 26). There was another special verdict, and also a general verdict in favor of the plaintiff in the case for the sum of $9,169.39 (R., 27). A motion for a new trial was made and overruled, and the defendant filed sundry excep-

tions to the rulings and opinion of the court in certain matters of law, which were reduced to writing (R., 28 and 29).

The record shows that nothing further was done for about four years. On June 8, 1897, at a calling of the docket under the general order of court the action was dismissed. Two days afterwards, on June 10, 1897, the order of dismissal was stricken out and the case restored to the docket (R., 29). On June 28, 1897, the attorney for the defendant entered an order withdrawing his appearance. On June 13, 1898, another attorney for the defendant, whose name appears nowhere else in the record, also entered an order withdrawing his appearance (R., 29).

The next entry is as follows:

> "Thence the case was continued to the *July sitting, 1898*, when said exceptions having been presented to the court were disallowed as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the questions of law raised by the defendant's exceptions."

The following entry is:

> "Thence the case was continued from sitting to sitting into the April sitting, 1899, when on the 12th day of June 1899, at a calling of the docket under the general order of court, said action was dismissed."

The next entry reads as follows: *And now at this present October sitting, 1900, to-wit, on the 18th day of said October,*

*1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered.* (R., 30).

Then on November 17, 1900, there was a motion by the plaintiff for judgment on the verdict of the jury; and judgment was accordingly entered on November 20, 1900, against the defendant for the sum of $12,881.46 and costs of suit, with award of execution. (R., 30–31.)

None of the said matters shown by the said record are denied or negatived in any way by the defendant.

A demurrer to the declaration in the Supreme Court of the District of Columbia, founded on the foregoing record, was interposed on February 20, 1904, on the following grounds: "One of the matters of law intended to be argued in support of this demurrer is that the court was without jurisdiction to render the judgment in the declaration referred to, because the case was restored to the docket after the end of the term in which judgment of dismissal had been entered therein." (R., 31.) As an additional ground of demurrer, it was orally assigned, that even if the Massachusetts court had the power to vacate the dismissal and restore the case to its docket, under the circumstances, it could not do so without notice to the defendant. This demurrer was fully argued by counsel for both parties and was considered by the court for a period of six weeks or two months. It was overruled by the court on June 23, 1904, and leave granted the defendant to plead over. (R., 32.) The opinion of the Chief Justice of the Supreme Court of

the District of Columbia overruling said demurrer is set out in full further on in this brief.

The defendant, on July 13, 1904, filed two pleas to the declaration: (1) The general issue *of nul tiel record;* and (2) a special plea wherein he sets forth that, on June 12, 1899, the cause against him in Massachusetts was dismissed; that, under the rules of the court, that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms of the court, until October 18, 1900; that in the meantime, on April 29, 1899, the defendant filed his petition in bankruptcy in the District Court of the United States for the District of Colorado, in which, in his schedule, he enumerated the debt due to said Charles H. Wetmore, and was by the said district court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, wherein was included the debt here sued on; that subsequently to the discharge, as aforesaid, he made inquiry of the clerk of that court as to the condition of the suit, and was informed that the same was no longer pending; that relying upon this statement he took no steps in that court to suggest his discharge in bankruptcy; that the action in Massachusetts was sought to be restored to the docket of the court in that State, without summons, citation, or notice of any kind to the defendant, or to any one for him, and without his knowledge; and that the court had no jurisdiction in the premises to render such judgment. (R., 32 and 33.)

There was a joinder of issue by the plaintiff on the defendant's first plea, and a demurrer to the second. The grounds for said demurrer were as follows:

"First: That the jurisdiction of the Massachusetts court over the original suit and the parties thereto, and the power of said court to render judgment sued on herein, were in no way affected by the institution of the bankruptcy proceedings by the defendant, his adjudication as a bankrupt and his discharge prior to the rendition of said judgment by said court."

"Second: That the defendant's discharge in bankruptcy having been granted before the rendition of the judgment sued on herein, does not constitute a defense, and cannot properly be pleaded as a defense, to this suit."

"Third: That the defendant was not entitled to notice of the restoration of the original suit to the docket of the Massachusetts court, the said suit having been inadvertently dismissed through a mistake of fact of said court, and restored to the docket by said court for reasons apparent of record, no new thing being brought upon the record" (R., 35 and 36.)

The said demurrer was fully argued by counsel for both parties and was sustained by the court after several weeks consideration. (R., 36.) The opinion of the learned Associate Justice of the Supreme Court of the District of Columbia, sustaining said demurrer, appears at pages 36 to 41 of this record. From the order sustaining said demurrer the defendant, on January 6, 1905, was, on petition, allowed a special appeal to the Court of Appeals of the District of Columbia. (R., 41.) This appeal was argued by counsel for both parties, and on April 17, 1905, the interlocutory order appealed from

was reversed, the court below directed to vacate said order, and to enter an order overruling the plaintiff's demurrer, with leave to the plaintiff to plead over and for further proceedings. (R., 44, 45.)

The opinion of the Court of Appeals of the District of Columbia appears at pages 49 to 60 of this record.

On May 16, 1905, the Supreme Court of the District of Columbia entered an order overruling the plaintiff's demurrer to the defendant's second plea; thereupon, the plaintiff elected to stand upon said demurrer, and, upon motion of the defendant, final judgment was entered for the defendant. The plaintiff appealed to the Court of Appeals of the District of Columbia (R., 46).

On October 10, 1905, the case was submitted for the consideration of said Court of Appeals without argument and on the printed record (R. 49). On October 12, 1905, the judgment below was affirmed (R., 60). The opinion appears at page 49 of this record.

A writ of error to review said judgment of the Court of Appeals of the District of Columbia in the Supreme Court of the United States was sued out on October 18, 1905. The case is now here on said writ of error.

## ASSIGNMENTS OF ERROR.

The Court of Appeals of the District of Columbia erred—

1. In affirming the action of the Supreme Court of the District of Columbia in overruling the demurrer to the second plea and rendering judgment for the defendant (R., 46).

2. In holding that the action of the Superior Court of Suffolk County, in the State of Massachusetts, in striking out the judgment of June 12, 1899, dismissing the suit between the parties to these proceedings, and rendering on November 20, 1900, the judgment herein sued on for the plaintiff and against the defendant, without notice to the defendant, was without jurisdiction and was null and void (R., 59 and 60).

## POINTS AND AUTHORITIES.

**The judgment of dismissal of June 12, 1899, having been entered improvidently through a mistake or oversight as to an entry of record, the Massachusetts court did not thereby lose jurisdiction, and had the power to vacate the dismissal and restore the case to the docket after the term.**

This is the first proposition which naturally arises on this record. That the judgment of dismissal was entered improvidently, and through the failure to discover that action had been taken in the case within one year, does not admit of any doubt. It was so found by the Massachusetts judge who dismissed the case and afterwards reinstated it, and an examination of the record shows the same thing (R., 31). It is nowhere denied by the defendant in error.

The plaintiff in error does not wish to be understood as questioning, in any way, the proposition that a final judgment, entered regularly and not through mistake or inadvertence, cannot be vacated after the expiration of

the term at which it was rendered, *either with or without notice,* and that this rule applies to judgments of dismissal as well as to any other final judgments. The reason is that jurisdiction is lost after the lapse of the term under such circumstances. But a well known exception to this general rule is that a judgment of dismissal based upon mistake or inadvertence, such as appear in this record can be set aside after the term, and that is the proposition with which this court is concerned in this case. The reason is that jurisdiction is not lost by a dismissal by mistake. This is one of the exceptions to the general rule that has been recognized in the decisions of this court for nearly a century.

The first case in this court in which it was held that a dismissal by mistake can be vacated after the term is *The Palmyra,* 12 Wheat., 1. In that case a libel in admiralty was filed against the brig *Palmyra.* A decree was pronounced restoring the brig to the claimants without damages for the capture, injury or detention. The case finally reached this court on appeal. The appeal was dismissed because it appeared from the record that there was no final decree. At the next term of the court it was shown that an imperfect record had been transmitted to this court, the final decree having been omitted through inadvertence. The cause was reinstated. It was contended that the court had no power to reinstate the case after the dismissal and the expiration of the term. Mr. Justice Story, who delivered the opinion of the court, said (p. 10):

> "Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice, and we do not doubt that *this court possesses the power to reinstate any cause dismissed by mistake.* * * * The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and *is according to the known practice of other judicial tribunals* in like cases."

It certainly cannot be contended that a judgment dismissing an appeal is not a final judgment after the term. That matter has been decided too often. Nor can it be contended that the court did not *intend* to dismiss the appeal in said case. The plaintiff in error invites this court's attention to this feature, as the opinion of the court below limits the Massachusetts court's power, after the term, to the correction of mistakes of the clerk, and the like, and denies it the power to correct after the term judgments which were intended though based on clerical mistakes (R., 55).

A case which was cited by counsel for defendant is error, in the court below, against the *Palmyra* case is that of Rice *vs.* Minn, & N. W. R. R. Co., 21 How., 82. It will be observed that this court in that case merely held that when a record has been brought up by a writ of error the writ after the term becomes *functus officio*, and if the parties desire to bring the record of the case again before the court it must be done by another writ of error. It was also said, "The former writ is not returnable to the present term and cannot therefore, according to the principles which govern this common-law writ, bring the record

before us." Morever, the case was regularly before the court at the previous term and was passed upon with full consideration and not through inadvertence or by mistake. The *Palmyra* case was not overruled nor was its reasoning questioned, but it was held not applicable to writs of error. Besides, it will be seen by the case of Alviso *vs.* U. S., 6 Wall., 457, a later case and one identical in principle and most similar in circumstances to the *Palmyra* case, that this court expressly followed the *Palmyra* case and commented upon it with approval. It will also be observed in this later case that the judgment of dismissal while based upon a mistake, was the judgment this court *intended* to enter, nevertheless it was vacated after the term.

In almost every case in which the rule is laid down by this court that judgments cannot be vacated after the term, judgments of dismissal by mistake are excepted. See Phillips *vs.* Negely, 117 U. S. 665, and cases therein cited. On page 674 the court said:

> "No principle is better settled, it was said n Sibbald *vs.* the United States, 12. Pet., 488, 492, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (Cameron *vs.* McRoberts, 3 Wheat., 591; Bank of Kentucky *vs.* Wistar, 3 Pet., 431); *or to reinstate a cause dismissed by mistake.* (The *Palmyra*, 12 Wheat., 1)."

And on page 678:

> *"We are of opinion, and so decide, that after the term at which they were rendered the power of the cour over the parties and over its record remains only in the excepted cases already noticed, * * *."*

It thus has been definitely decided by this court that the jurisdiction or power of a court over the parties and its records is not lost in the excepted cases, and that a judgment of dismissal by mistake is one of the exceptions. This seems to be conclusive of the case now before this court, for if the Superior Court of Suffolk County did not lose jurisdiction over the parties and the subject-matter, after the lapse of the term, by the judgment of dismissal by mistake, then it had jurisdiction over them, and that is the only point raised by the defendant's second plea, and the Supreme Court of the District of Columbia was bound to enforce the judgment of the Superior Court of Suffolk County when sued on in said court, and this it did until its judgment sustaining the demurrer to the defendant's second plea was reversed by the Court of Appeals of said District. Moreover, it has often been decided by this court that if the court from which the record comes had jurisdiction at the time the judgment was entered, no matter how irregular or erroneous that judgment may be, it is the court's duty to enforce the judgment under the provisions of Art. IV., Sec. 1 of the Constitution of the United States. The bankruptcy features of said plea have no bearing on this proposition, as will be shown further on in this brief. In

fact the contention that they have seems to have been abandoned by the defendant in error.

Other United States courts recognize the exception contended for by the plaintiff in error. See City of Manning *vs.* German Ins. Co., 107 Fed. Rep., 52. This case was decided by the United States Circuit Court of Appeals, Eighth Circuit, on March 11, 1901. In the opinion on page 56, the court said :

> " The decisions of the Supreme Court are controlling authority in this court. A careful examination and review of them discloses the fact that the uniform rule of that court is that judgments at law cannot be vacated or substantially modified by the courts which rendered them, subsequent to the expiration of the term at which they were entered, in the absence of motions or proceedings for that purpose during such terms; and the only exceptions to that rule are that clerical mistakes, such mistakes of fact not put in issue or passed upon as may be corrected by writ of error *coram vobis* or motion in lieu of that writ, *and mistakes in the dismissal of a case, may be corrected after the expiration of the term.* The case before us falls under the rule, and not under the exceptions. There was no *error of fact or mistake of clerk, court, or counsel* in the proceedings at the May term, 1899."

And that the courts of Massachusetts have the power to vacate final judgments based upon mistake after the term, and that they exercise it, see the case of Capen *vs.* Stoughton, 16 Gray, 364. Justice Bigelow, who delivered the opinion of the court, said :

> "If the facts stated in the petition are true, it is clear that the *order* of the court of common pleas, accepting the verdict of the jury and ordering it to be certified to the county commissioners, *was improvidently made through mistake of counsel*, and that very great injustice would be done if the error could not be in some way corrected. We think it equally clear that the court had the power at *a subsequent term*, in the exercise of a judicial discretion, on satisfactory proof that *an erroneous entry had been made on the docket through mistake*, to order the case brought forward for the *purpose of vacating the previous erroneous order*, and making such disposition of the case as the rights of the parties might require."

It will be seen from this case that the Massachusetts court *intended* to make the ord er or judgment which was subsequently vacated after the te rm, and that said court held that it had the power to vacate such order because based upon mistake. Yet the Court of Appeals of District of Columbia holds that the Massachusetts court, in the present case, had no such power, and that its power extends only to the correction of clerical mistakes and not to judgments based thereon.

It is obvious that this court in this case is only concerned with the *power* of the Massachusetts court to vacate the dismissal and reinstate the cause, and not with whether it was done wisely or prudently. In the Board of Commissioners of Lake Co. *vs.* Platt, 79 Fed. Rep., 567, it was said that the test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong. (See also Voorhees *vs.* Bank of U. S.,

10 Pet., 449). And this is especially true in case of a collateral attack. (See Laing *vs.* Regney, 160 U. S., 531, and cases therein cited.) As the Massachusetts court in this case had the power to vacate the dismissal and reinstate the cause, the judgment sued on cannot be declared a nullity. The proper remedy, if the defendant in error conceived himself in any way injured, was for him to proceed by a direct attack in the courts of Massachusetts against the judgment. He had the right so to do under the laws of Massachusetts. See Revised Laws of Mass., Ch. 193, Sec. 22, which reads as follows :

> "After the entry of final judgment in a civil action in the supreme judicial court, the superior court, or a police, district or municipal court, the court in which the judgment was entered may, upon petition, grant a writ of review. After the entry of final judgment by a trial justice, the superior court may, upon petition, grant a writ of review. *If the judgment was rendered in the absence of the petitioner and without his knowledge, the petition shall be filed within one year after the petitioner first had notice of the judgment;* otherwise, within one year after the judgment was rendered. In the supreme judicial court or in the superior court, the petition shall be filed in the county in which the judgment was entered."

Thus it will be seen that the defendant in error, under the laws of Massachusetts, could have applied for a writ of review at any time within one year after he first had notice of the judgment sued on herein, the same having been entered without his knowledge, irrespective of the lapse of time after the entry of said judgment.

The power to vacate judgments entered by mistake or through an oversight is exercised in other States (See Murray *vs.* Derrick, 101 Ga., 113). In that case judgment was entered against the defendant at one term, execution was issued, and the amount of the judgment paid under protest. Several terms thereafter the judgment was vacated on motion, the judge overlooking the fact that the defendant (a justice of the peace) had been excused from attendance on the court. An appeal was taken. The appellate court said, p, 116:

> "The attention of the circuit judge having been called to the absence of the defendant, upon leave, at the time of the rendition of the judgment against him, he, upon motion, set aside this judgment. We think this was a wise exercise of the discretion with which he was invested. To have done otherwise would have been to have perpetrated a gross judicial fraud upon the defendant; and we therefore approve the ruling of the trial judge.
>
> (See also Portis *vs.* Talbott, 33 Ark., 218).

In the courts below counsel for the defendant in error cited the cases of Wood *vs.* Payea, 138 Mass., 61, and Pierce *vs.* Lamper, 141 Mass., 20, to show that after the term final judgments cannot be set aside. It was so held in these cases, as it has been held in many others, and the plaintiff in error does not doubt the correctness of said decisions. But it will be observed that the judgments sought to be vacated were regular and not based upon mistake. The exception contended for was recognized. See Wood *vs.* Payea, 138 Mass., 62, where the court said:

> "While it may correct any misprision of the clerk, or *other mistake*, it cannot vacate a final judgment, entered, *without any error or mistake*, in accordance with the order of the court (Mason *vs.* Pearson, 118 Mass., 61, and cases cited)."

Moreover, these cases were *direct attacks* to correct error, and not an effort to assail a judgment in a collateral proceeding. This feature will be noticed further on in this brief.

If the Massachusetts court did not lose jurisdiction by the dismissal by mistake and the lapse of the term, as this court has often held, then of course said court had jurisdiction, and even if under the practice of the Massachusetts courts, which does not appear, and the presumption would be against it, it was requisite to notify the defendant of the motion for judgment on the verdict, the failure to give such notice would be a mere irregularity and not a jurisdictional defect.

## II.

**The judgment of dismissal of June 12, 1899, was founded upon a mere clerical mistake of the clerk, or, at the most, upon a clerical mistake of the judge, and a judgment so entered can be vacated at any time.**

This proposition is involved in the one that has just been examined, but is here considered separately to promote clearness of discussion.

That said judgment was founded upon a clerical mistake or misprision seems plain. The court did not undertake to make a judicial determination of the suit

There was no hearing, only a *pro forma* dismissal, based upon an oversight or mistake as to an entry. And the mistake on which said order was founded must have been that of the clerk either in recording the minutes, or in reading the record. The judge, on the calling of the docket under the general order of court, certainly did not read through the record of each case to ascertain if action had been taken within one year. He was obliged to depend upon, and as a matter of practice in the courts of Massachusetts, does depend upon the information given him by the clerk. There is no claim in the defendant's plea, or elsewhere, to the contrary, and this court will assume that such was the fact if it is necessary to do so to give validity to the act of the judge in vacating said dismissal. This is on the principle that when a foreign judgment of a court of competent jurisdiction is brought into question it must be assumed that everything that was done by the court in that suit was regularly and legally done, and that such judgment is valid. (Westervelt *vs.* Jones, 5 Kans. App., 35; Freeman on Judgments, Sec. 135a; Vol. 13, Am. and Eng. Ency. of Law (2d ed.) 987.) And also because a plea to the jurisdiction must *negative* by certain and positive averments every fact on which jurisdiction can be legally predicated; and if by any reasonable intendment the facts alleged in the plea can exist and the court rendering the judgment could still have had jurisdiction the plea is bad. (Vol. 11 Enc. of Pl. and Pr., 1160, and cases there cited).

It was said by the learned associate justice of the

Supreme Court of the District of Columbia, who sustained the demurrer to the second plea (R., 40):

> "For the foundation of all such general orders of dismissal, the court is obliged to rely upon the accuracy of its recording officer to keep it informed of the condition of the record; and if the court acts on the assumption that the record states one fact, when it actually states another, which would require a different order or judgment, it can, with apparent good reason, attribute the erroneous order made to the mistake of the clerk, either in recording the minutes or in reading the record."

It has been pointed out in Section I of this brief, that the power of the Massachusetts court is not limited merely to the correction of clerical errors pure and simple, but extends to the correction of judgments based thereon, even though the judgments were *intended*. *The Palmyra*, 12 Wheat., 1; Alviso *vs.* U. S., 6 Wall., 457; Capen *vs.* Stoughton, 16 Gray, 364; City of Manning *vs.* German Ins. Co., 107 Fed. Rep., 52; Phillips *vs.* Negeley, 117 U. S., 665.

The following cases also bear out this contention:

In Sheepshanks *vs.* Boyer, Baldwin's C. C. R., 462, a judgment entered at a previous term, was stricken out on motion of an attorney representing that he had ordered his appearance to be entered by the clerk, who had neglected to make the entry.

In Sherburne *vs.* King, 2 Cr. C. C. R., 205, it was held that an action of replevin discontinued by the non-appearance of the defendant at the first term, may be

reinstated at the next term, if the omission to enter the appearance was the error of the clerk.

In McCormick's Lessee *vs.* Magruder, 2 Cr. C. C. R., 228, a judgment was entered at December term, 1819, against the casual ejector by default, and a writ of *habere facias* issued returnable to the April term, 1821. At this term Mr. Taney moved to quash the execution and rescind the judgment, upon affidavits that Mr. Marbury had ordered the clerk to enter his appearance before the judgment was entered, but the clerk, by mistake, had entered it in another cause, and the court granted the motion, quashed the execution and rescinded the judgment.

Can it possibly be contended that the judgments were not intended in any of the foregoing cases? They were intended, but they were vacated after the term because founded on clerical mistakes. And why did the courts have power to vacate them? Because, as this court has repeatedly said, jurisdiction is not lost over the parties and the record under such circumstances. They are exceptions to the general rule. And if jurisdiction was not lost over the parties and the subject-matter in the case now before this court, then the judgment of the Court of Appeals of the District of Columbia should be reversed, as that is the only point raised on this record.

Now suppose the judgment of dismissal, so often referred to herein, cannot be attributed to the mistake of the clerk in not properly recording the minutes or in reading the record, though why not is not at all apparent, then it was certainly due to a clerical mistake of

the judge in not properly reading the record—the entry was there but he failed, at the time, to discover it.

*That clerical mistakes of the judge stand on the same footing as those of the clerk does not admit of doubt.* Black on Judgments, Sec. 328:

> "A judgment which was *inadvertently* or irregularly entered by the *judge* or the clerk without any authority may be vacated at any time * * * (and cases cited)."

In Chase *vs.* Whitten, 62 Minn., 498, it was said:

> "It is also apparent to us from the record, and particularly from the language of the order for judgment on the pleadings, that all the court intended to do was to order judgment declaring the foreclosure void; that its judicial mind never assented to the proposition that the mortgage was void, but that the order was worded as it was *through the clerical mistake or inadvertence of the judge* by reason of his not knowing or having presently in mind the fact that the prayer of the complaint for relief asked that the mortgage itself be adjudged void. We think the court had the power to correct in this way *its own clerical mistake or misprision* so that the judgment might conform to what the court intended it should be (McClure *vs.* Bruck, 43 Minn., 305). In as much as the court has this inherent power, even on its own motion, to correct its own records, the question whether the defendant was or was not negligent in setting this power in motion is not material."

See also Morrison *vs.* Stewart, 21 Ill., App., 113.

## III.

**The judgment of dismissal of June 12, 1899, being irregular and entered contrary to the practice of the Massachusetts court, said court had the power to set aside said dismissal and reinstate the cause, notwithstanding the expiration of the term.**

That said judgment of dismissal was irregular and entered contrary to the practice of the court is perfectly plain (R. 31), and is not denied by the defendant in error. Under the practice of the court as shown by the record, the cause should have been dismissed under the general order *only* when action had not been taken therein within one year. It was irregularly dismissed contrary to this practice.

An irregular judgment is defined to be a judgment that was rendered contrary to the law or practice of the court. 1 Tidd's Pr., 512.

In Dick *vs.* McLaurin, 63 N. C., 185, it was said :

> "There can be no doubt of the power of a court to set aside an irregular judgment at any time after it is rendered."

See also Union Bank of Georgetown *vs.* Crittenden, 2 Cr. C. C. R., 238.

In Stacker *vs.* Cooper Circuit Court, 25 Mo., 401, it was held, where a judgment is regularly rendered it cannot be set aside at a subsequent term ; where, however, it is irregular, the court may at a subsequent term correct the irregularity ; and that after an order of ref-

erence in a cause is made, and while it is still standing unexecuted and in force, final judgment in the case should not be rendered; if so rendered, the court may, at a subsequent term, recall the same and set it aside.

See also Hunt *vs.* Yeatman, 3 Ohio, 16, wherein the court said:

> "*The power to set aside a judgment, for manifest irregularity in entering it, is exercised by all the courts of justice.* And this power is exercised, not merely at the term in which the judgment is rendered, but at a *subsequent term.* To alter or amend a judgment otherwise regularly entered is a very different thing from setting it totally aside for irregularity. The majority of the court entertain no doubt that the city court might in a proper case set aside a judgment entered at a previous term."

Black on Judgments, Sec. 326.

> "It is a general rule that the court in which a judgment was rendered may vacate it, on motion, *at the same or a subsequent term*, on proof that it was entered irregularly and not according to the course of the court * * * (and cases cited)."

*No notice is required to vacate an irregular judgment at a subsequent term.* Nave *vs.* Todd, 83 Mo., 601. This case was an action of ejectment; plaintiff's title consisted of a mortgage and a sheriff's deed made upon foreclosure proceedings; default and a final judgment were entered at the September term, 1863; at the March term, 1864, on motion and *without notice*, this judgment was set aside so far as final and allowed to stand as an interlocutory

judgment by default, which was then made final. The foreclosure was made under an act by which final judgment should have been entered at the next term after the default was taken. The court said, page 606:

> "To thus enter the final judgment at the same term, was *an irregularity which appeared upon the face of the record.* Such irregularities may be corrected by the court at a *term subsequent* to that at which the judgment is rendered. (Stacker *vs.* Cooper Circuit Court, 25 Mo., 401; Harbor *vs.* Pacific R. R. Co., 32 Mo., 423; Downing *vs.* State, 43 Mo., 390). The first final judgment was not void, and a motion was the proper method of reaching the irregularity. (Branstetter *vs.* Rives, 34 Mo., 318; Lawther *vs.* Agee, 34 Mo., 372; Sims *vs.* Gray, 66 Mo., 616). The court had the *power* and was *in duty bound* to make the correction, and *we see no reason why notice should have been given to defendant.* * * * *Certain it is, the judgment as corrected and finally entered up is not void, and that disposes of the question between these parties in this collateral proceeding.*"

The subject of "notice" will be treated more at length in the next section of this brief.

## IV.

**The defendant in error was not entitled to notice of the vacation of the dismissal and the reinstatement of the original suit to the docket of the Superior Court of Suffolk County, in the State of Massachusetts, the said suit having been inadvertently dismissed through mistake**

**and reinstated on the docket by said court for reasons apparent of record, no new thing having been brought before the court; and even if notice was required, the absence of it affords no ground for assailing the judgment sued on herein in a collateral proceeding such as the present one.**

The two subdivisions of this proposition can be well considered together.

It might be advisable to here repeat what has been said many times before, that if the Massachusetts court did not lose jurisidiction it had jurisdiction, and notice to the defendant in error was not necessary to confer jurisdiction when said court had never lost it by the entry of the judgment of dismissal founded on a mistake. It seems to be wholly unnecessary to consider this subject in view of the decisions of this court already referred to herein. But in the event that the plaintiff in error should be mistaken in this respect, authorities will be mentioned in support of the proposition above set out.

In Odell *vs.* Reynolds, 70 Fed. Rep., 656, the points involved were directly presented to and decided by the United States Circuit Court of Appeals, sixth circuit.

The court said :

> "The first question to which we shall give attention arises upon the objection of the defendant to the entry made by the Superior Court of Cook County on the 26th day of February, 1893, in correction and amendment of the judgment it had rendered on the 18th day of April, 1892, The grounds

of that objection, as stated by counsel for defendant in error in argument, are: First, that the court had no power to make the order, for the reason that the term at which the judgment was rendered had expired; and, secondly, that the order was made without any notice to the defendant of the proposed action, and without his knowledge. * * * On the contrary, it is a power inherent in the authority of every court having general jurisdiction to correct errors in the making up of its record whereby they fail to express the truth in regard to its proceedings. And the power may be exercised by the court at any time when the error is brought to its attention, and no injury is likely to happen to the parties or other persons by its exercise. No doubt such power should be cautiously and discreetly used but *that it exists is well established by authority. It is the settled doctrine of the English courts, and in most of the courts of this country.* * * * In the present case counsel for the defendant submit as a vital objection to the action of the Illinois court in making the entry for correction of February 26, 1893, that 'to make that finding and to insert it in the judgment *nunc pro tunc*, was to materially add to and substantially modify the judgment that was rendered at the prior term; for it involved the very character and scope of the agency to which alone Reynolds had committed the right to enter his appearance and confess judgment.' *But the consequence of the correction is no test of the power of the court to make it.* In Wight's case, just cited, the effect of the entry was to annihilate the whole foundation on which his petition rested. * * * Sometimes the propriety of such action exists in cases *where the correction may be made upon that which appears in the record*

*itself, and is necessary to make it consistent and harmonious one part with another.* In other cases it is necessary in the interest of justice to act upon matters not appearing from the record; for example, things resting in the recollection of the judge, or evidence adduced *aliunde. In the former case notice to parties is not necessary. No new thing is brought upon the record.* The court, for the clearer and more accurate expression of its final action molds into form that which is fairly and reasonably deducible from the whole record, taken together. *There is nothing to litigate. No right is substantially affected* (Free., Judg., Sec. 72*a*, 1 Black., Judg., Sec. 164; Emery *vs.* Whitwell, *ubi supra*; Matheson's Adm. *vs.* Grant, 2 How., 263). In the latter case the question of the necessity of notice may depend upon the source from which the evidence comes upon which the action is to be taken. If it is the recollection of the court, it is doubtful whether notice is required, for the reason that it is not open to contest. At all events, it would seem, upon the authorities, that corrections of the record made *by the court upon its own recollection would not be collaterally assailable though made without notice.*"

Here it was plainly decided that when the necessity for the correction, and what the correction should be, appear on the record, as they do in the case now before this court, there is no occasion for notice to the defendant, as there is nothing to litigate, no new thing being brought upon the record. The action of the court cannot be gainsaid, and the effect of the correction is no test of the power of the court to make it.

The court below endeavors to show that the reasoning in the above case does not apply to this case. The opinion of said court reads:

> "* * * but it is equally plain that the ruling of the court was not intended to extend to cases where any right was to be substantially affected or where any of the parties were likely to be injured by the proposed correction. Now, it is difficult to conceive of any case where a right was more substantially affected or where one of the parties to the case was more seriously injured than the case now before us." (R., 58.)

How was the defendant in error injured, or what right of his was substantially affected? He had the right, on any proper showing, under the statutes of Massachusetts, herein before set out, to file a petition in the Superior Court of Suffolk County at any time within one year after he first had notice of the judgment, no matter how long a time had elapsed from the rendition of said judgment. He also had the right of appeal. If he thought himself injured, why did he not apply to the Massachusetts court for redress? It is the remedy which would most naturally suggest itself to any one. He was not injured. Was he deprived of his right to plead his discharge in bankruptcy in the Superior Court of Suffolk County, in the State of Massachusetts? No. That matter has been decided by this court in the case of Dimock *vs.* Revere Copper Co., 117 U. S., 559. In that case the plaintiff recovered a judgment on April 1, 1875, in the Superior Court of Massachusetts for Suffolk County (the

very same court out of which came the record in the present case); in June, 1874, the defendant was adjudicated a bankrupt; on March 26, 1875, he was discharged by the bankruptcy court, and in March, 1879, suit was commenced on said judgment in New York, and the defense of a discharge in bankruptcy was interposed.

This court said, on page 565:

> "So here, if Dimock had brought his discharge to the attention of the superior court at any time before judgment it would have been received as a bar to the action. *and under proper circumstances, even after judgment, it might be made the foundation for setting it aside and admitting the defense* (Ray *vs.* Wight, 119 Mass., 426; Page *vs.* Cole, 123 Mass., 93; Golden *vs.* Blaskoff, 126 Mass., 523). *Nothing of the kind was attempted.*" The same rule has been applied elsewhere (Sands *vs.* Perry, 38 Hun., 263).

What right did the defendant in error lose? He lost none. Why his strange reluctance to move in the Massachusetts courts? He wants the courts of this district and this court to infer everything in his favor in regard to his discharge in bankruptcy without giving the plaintiff in error an opportunity to show that said discharge in bankruptcy does not constitute a defense to the judgment of the Massachusetts court. The plaintiff in error can show in a proper proceeding that the said discharge in bankruptcy does not constitute a release of or defense to the said judgment. None of the matters alleged in the second plea of the defendant in error in regard to his adjudication as a bankrupt or his discharge in bankruptcy has any bearing on the jurisdiction of the

Massachusetts court to enter the judgment herein sued on, and that is the only point raised by said plea. And such contention has been abandoned by the defendant in error. Nevertheless it will be shown further on in this brief that said allegations do not affect the jurisdiction of the Massachusetts court to enter said judgment.

The case of Odell *vs.* Reynolds was cited with approbation in the case of Groton Bridge and Mfg. Co. *vs.* Clark Pressed Brick Co., 126 Fed. Rep., 552. This case was decided on November 20, 1903.

The court, on page 555, said:

> "It might well be asked, of what benefit would notice be to a party if the order is made upon the personal recollection of the trial judge, and for this reason is not open to contest? But, without determining that question, I hold that, even if it was error to make the amendment without notice, it could only be corrected by appeal, and does not subject the action of a superior court to collateral attack."

And, as has been said before herein, this court is concerned only with the *power* of the Massachusetts court, that is, its right to enter on the inquiry, which is synonymous with jurisdiction. Said court did not lose jurisdiction.

In Wight's case, 134 U. S., 136, cited in the opinion rendered in Odell *vs.* Reynolds, the consequence of the order entered after the term was to give the district court jurisdiction, where, without the order, it had none; and the entry of the order annihilated the petitioner's case and, moreover, it was a criminal case.

The court said, on page 145, quoting the law as laid down by the Supreme Court of Minnesota:

> "And while we admit the power to amend a record after the term has passed in which the record was made up, we deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. * * * *But when the facts stand undisputed*, and the objection is based upon the technical point alone that the term is passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it."

This case was cited in the court below to show that the consequence of the order entered after the term is no test of the power of the court to make it, and to show that the courts do possess the power to correct their records after the term, especially when the facts stand undisputed, and the reason for the correction and what the correction should be appear upon the record, as in the present case. See also Rhoads *vs.* Commonwealth, 15 Penn. St., 276.

There is no doubt, of course, where the correction of the record is based upon evidence *aliunde*, the defendant should be notified, so as to give him an opportunity to controvert the new matter.

Black on Judgments, Sec. 134.

> "* * * In general, we may say that the necessity of notice of such an application must depend upon the sources which are to furnish the evidence

of the judgment to be entered. *If the examination is to be confined to the record, the presence of the defendant could not affect the result, nor would he have room to contest it.* But if it is to be based on extraneous proof, it is but just that he should have an opportunity to prepare countervailing testimony."

See also Freeman on Judgments, Sec. 142.

In Emery *vs.* Whitwell, 6 Mich., 474, it was held that notice is only necessary when the nature of the error and the appropriate amendment depend on *matters not apparent on the face of the record, but shown aliunde.*

See also—

Nave *vs.* Todd, 83 Mo., 601.

Emery *vs.* Berry, 48 N. H., 473.

Balch *vs.* Shaw, 7 Cush., 282.

What matters may be inquired into when a judgment is collaterally assailed? In Thompson *vs.* Tolmie, 2 Pet., 157, the court said, page 162:

"The counsel for the defendant in error here, in the argument, considered these proceedings open to the same examination and objections as they would be in an apellate court on a direct proceeding to bring them under review. This, however, is not the light in which we view the question now before us. * * * The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be

corrected by some direct proceeding, either before the same court to set them aside or in an appellate court."

See also Morse *vs.* Presby, 25 N. H., 303.

And that the Massachusetts court had the jurisdiction or power to do what it did, under the circumstances, it is believed, the cases set out under the various sections of this brief conclusively establish.

In Walden *vs.* Craig's Heirs, 14 Pet., 147, an amendment was made to the declaration by extending the demice to fifty years, after the suit had been disposed of over twenty years. It was objected that "the order itself is a nullity, made *ex parte*, on the plaintiff's motion without notice to the defendants, or to any one interested to defend; and that, after the parties to the judgment in in ejectment had been out of court for more than twenty years." The court said, page 154:

> "It is admitted that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void. *But this is only where original jurisdiction is exercised, and not a decision of a collateral question in a case where the parties are before the court.*"

The court thus held that the parties were before the court notwithstanding a final judgment had been rendered in the cause twenty years before, and there had been no new notice to them.

In Mann *vs.* Schroer, 50 Mo., 306, it was held that where the clerk in entering up judgment on a mechanic's lien omitted to make a special judgment, the entry at the *next term* of a special judgment correcting the mistake *nunc pro tunc, without notice to the defendant* is *not such an error* as would render the judgment *void*, or could be taken advantage of in a collateral proceeding. But where the case is directly brought up by writ of error, the failure of the plaintiff to notify the defendant of his motion to correct the judgment will render it proper to reverse and remand the cause with leave to the plaintiff to renew his motion.

No notice at all is required where the reason for the correction appears in the record. See Vol. 17, Am. & Eng. Ency. of Law (2d ed.), 823.

It might be well now to examine the cases cited in the courts below by the defendant in error relating to the proposition under consideration. The plaintiff in error wishes to reiterate what has been said before herein, that it is not contended by him that a *regular* final judgment, whether of dismissal or otherwise, not based upon *mistake*, in the absence of statute, can be vacated after the term, *either with or without notice.*

In Morgan *vs.* Campbell, 54 Ill. App., 242, the dismissal was not based upon a mistake, nor was it irregular, nor was it the result of a clerical misprision. The case clearly fell within the general rule, and not within the exceptions, as laid down by this court. Moreover, its vacation was sought upon motion based upon *affidavit*, and notice was, of course, required to give the opposite

party an opportunity to offer "countervailing testimony." Also it was a *direct attack* in the very same case, and not an attempt to make the objection in a collateral proceeding. The correctness of the decision is not disputed.

In Hetrick *vs.* Wilson, 12 Ohio St., 136, a case much relied upon by the defendant in error, the judgment of dismissal was not based upon a mistake. It was sought to be set aside on petition and *affidavit.* It was a direct attack, and the remarks concerning the preceding case apply. In addition, there is a statute in Ohio which requires notice in just such a case. See page 138 of the decision where the statute is set forth as follows:

> "The proceedings to correct mistakes or omissions of the clerk, or irregularities in obtaining a judgment or order, shall be by motion *upon reasonable notice to the adverse party, or his attorney in the action.*"

Jenkins *vs.* Corwin, 55 Ind., 22, The same applies. There was no mistake of fact. The judgment was set aside upon motion for a new trial—clearly a matter that could be litigated. It was a direct attack. The general rule obtained.

In Keeney *vs.* Lyon, 21 Iowa, 280, the judgment was sought to be set aside on motion with *affidavits.* It was a direct attack. There was no mistake of fact. It is true counsel in said case claimed that the judgment or order was based upon mistake. The court said, page 281:

> "As time passes, the mistake ought to be made

more and more manifest. * * * *No such showing is made in this case.* Parties would never be estopped by their voluntary action in a pending litigation, orders and judgments would have no sanctity, no conclusiveness, *if upon the slight evidence produced in this case* a controversy is to be reopened and again tried and determined."

Moreover, the decision contemplates that in some cases judgments may be set aside after the term, and this court is concerned with the *power* of the Massachusetts court and not with its prudent or judicious exercise thereof.

The cases of Jameson *vs.* Kinsey, 85 Mo. App., 298; Ewing *vs.* Perry, 35 Tex., 778; Smith *vs.* Wilson, 26 Ill., 187; Grames *vs.* Hawley, 50 Fed. Rep., 319, and Elder *vs.* Richmond Gold & Silver M. Co., 58 Fed. Rep., 536, were also cited by the defendant in error in the courts below. In every one of the cases enumerated the judgment of dismissal was *regular* and not based upon a *mistake*, either apparent upon the record or otherwise. Said cases all fall within the *general rule* and not with the *exceptions*, and are, therefore, not applicable to the case before the court.

It might be well to examine more closely the case of Elder *vs.* Richmond Gold and Silver M. Co., *supra*, as it appears to be the strongest case cited by the defendant in error. In that case a judgment was rendered in a district court of Colorado, dismissing the action, *but not through a mistake*, and thereafter a motion to vacate was denied. Nearly three years after its rendition, and without intermediate proceedings, the judgment was set

aside and judgment rendered for the plaintiff. It was held that the latter judgment was absolutely void, as rendered without jurisdiction, the Code of Colorado, Sec. 75, requiring that a party aggrieved by a judgment must apply for relief within six months after the adjournment of the term at which the same was rendered. Here it will be seen not only was the judgment of dismissal not founded upon a mistake, which makes the case fall under the general rule, but also that a statute of Colorado limits the time in which such a judgment can be vacated to six months after the adjournment of the term in which it was rendered, which time had more than elapsed. Not only is there no such provision in Massachusetts, but the statute there permits the review of such judgments at any time within one year after notice by the aggrieved party without regard to the lapse of time after the rendition of th judgment when the judgment was entered without his knowledge as in the present case.

It will be borne in mind that this court has expressly decided in the case of Phillips *vs.* Negeley, and in the other cases herein before referred to, that jurisdiction is not lost over the cause or the parties by the expiration of the term when the case falls within the *exceptions. To make the above cases applicable to the present case would be to do away with one, and perhaps two, exceptions, which are always noted in the decisions of this court on this point.*

The latest case decided in this court on the subject, which the plaintiff in error has been able to find, is Tubman *vs.* B. & O. R.R. Co., 190 U. S., 38 (an appeal from

the Court of Appeals of the District of Columbia, 20 App. D. C., 541), wherein the Chief Justice of this court said:

> "In the present case the motion to set aside was *denied* not granted, and as it was made after the lapse of the term, *and came within no exception*, the general rule was applicable."

In none of the arguments in the courts below did the defendant in error cite a case similar to the present one, where a judgment of dismissal, based upon a *mistake*, the mistake appearing in the record itself, and no evidence *aliunde* being produced, in which it was held that such judgment could not be vacated after the term without notice, even in a direct attack on the judgment, and certainly there is no such holding in a collateral proceeding.

Almost all the foregoing cases were cited by the defendant in error on the argument of the demurrer to the declaration, before the Chief Justice of the Supreme Court of the District of Columbia, and also on the argument of the demurrer to the second plea. The decision of the learned associate justice of the court below sustaining the demurrer to said plea appears on pages 36 to 41 of the record, and speaks for itself. The decision of the chief justice overruling the demurrer to the declaration was taken down stenographically and transcribed on the typewriter by counsel for defendant in error, and a copy thereof, as furnished counsel for plaintiff in error, follows:

## Opinion of Justice Clabaugh Overruling Demurrer in Wetmore vs. Karrick.

"This case presents an exceedingly nice question and one that I have endeavored to give a great deal of care and investigation. Now the simple question here is this: This plaintiff sues upon a foreign judgment or a judgment of another State, and he sets out in his declaration that it is a judgment rendered by a court of competent jurisdiction, etc., and then he exhibits with the judgment the entire record of that court. Now, how far that was necessary was for counsel to determine, and that has caused the difficulty in this case. The declaration in the case has been mislaid, but at any rate I asked counsel for defendant to submit additional statement of his reasons in behalf of his demurrer, and I thought I had the paper here and I wanted to read from it. It seems that it is mislaid, too. But he bases—the theory of the demurrer is based upon the fact that the record does not show that after this case had been dismissed in Boston, and unlawfully dismissed. It seems that they have a way there of dismissing a case, as we have of placing it upon the stet calendar, if in the progress of the case some action is not taken within a certain time, and in this case it appears that the court dismissed the suit on the supposition that no action had been taken in the case within the time, dismissed it as a matter of course, I assume. Now, that being so, when the court's attention was directed to the fact that some action had been taken within the time it struck out this dismissal and reinstated the case. Now, the contention of counsel is that the court had no right to do that, unless the record

affirmatively showed that the other party, the defendant in the case, had had notice of the fact of the reinstatement of the case. As I read the law, where a court record comes properly authenticated, showing a judgment of a court of competent jurisdiction and it shows that both the subject-matter and the party defendant were subject to the jurisdiction of the court, in other words that they have been summoned, that then full validity is given to that judgment when it is sued upon in another court; that is to say, that it is a *prima facie* case, at any rate. It may be shown afterwards that the party was not summoned. A defense may be put in by proof in the case, which shows that the court never had jurisdiction of the subject-matter. That will be a matter of defense; but in this case it is shown that the party was summoned. Now, the record, as I find it—but I may be mistaken in this case, it is such avery extensive record—it does not show that the party defendant was not notified of the fact of the reinstatement of the case. It seems to be silent on the subject. Now then, it seems to me that this court must conclude that the court in Massachusetts having reinstated the case and having entered a judgment on it, that it must have done so lawfully; in other words that the fact of the defendant having been brought into court and appearing by counsel, etc., that—unless it is shown subsequently that the court acted without jurisdiction—this court must assume that the Massachusetts court entered the judgment regularly and it seems to me that this is the doctrine laid down in the books. It seems to me that the Supreme Court so holds in 18th Wallace—I haven't the case, but can give it to counsel later—where the court says that every

fair intendment must be given the judgment of a court of another State when it is shown upon the face of the record that the court had jurisdiction of the subject matter and of the person. Now that is shown here. The only difficulty which arises in this case is that the court after dismissing the case has reinstated it without notice to the other party and, therefore, having dismissed the case, the court had lost jurisdiction and could not again acquire it without notice to the parties. *Now, I think that the court which has jurisdiction of the person and thing and unlawfully or by mistake dismisses a suit which the court had no right to dismiss, but it was only done through inadvertence, I cannot think that the court has not a right to reinstate that case without notice to the other party;* but, even if that was not so, if I am wrong in that conclusion of law, still this record does not show that the other party had no notice, and, therefore, this court must assume that the Massachusetts court in entering up the judgment entered it in accordance with the law, nothing being on the record to show otherwise. Therefore, that being the case—the only question raised by the demurrer—we are not speaking of the matter of defense, because I don't know what will happen when we get to the matter of defense. I shall have to overrule the demurrer.

"June 23, 1904."

## V.

**The jurisdiction of the Superior Court of Suffolk County, in the State of Massachusetts, over the subject-matter and the parties and the power of said court to render the judgment**

**sued on herein were in no way affected by the institution of the bankruptcy proceedings by the defendant in error, his adjudication as a bankrupt, and his discharge prior to the rendition of said judgment by said court.**

That the foregoing is a correct statement of the law does not admit of doubt. See Eyster *vs.* Gaff *et al.*, 91 U. S., 521, wherein the court said, page 524:

> "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however, seriously they might have affected the rights of the parties to the suit already pending. It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void."

See also—

Dimock *vs.* Revere Copper Co., 117 U. S., 559.

Boynton *vs.* Ball, 121 U. S., 457.

*In re* Davis, 1 Saw., 260.

The court below said in its opinion that,

> "It seems to be assumed by the appellee that the appellant had lost his right to plead his discharge in bankruptcy by his failure, upon the filing of his petition in bankruptcy, to ask for a stay of proceedings in the Massachusetts court" (R., 53).

With all respect to the court, the plaintiff in error (at that time the appellee below) says no such position was ever taken or assumed by him. How could it be when he contended that on a proper showing the defendant in error could have had the judgment set aside and been given leave to plead his discharge? This contention was plainly set out in the brief filed below by the plaintiff in error and two cases were cited in support thereof, Dimock *vs.* Revere Copper Co., 117 U. S., 559, and Sands *vs.* Perry, 38 Hun., 268.

## VI.

**The defendant's discharge in bankruptcy, having been granted before the rendition of the judgment sued on here, does not constitute a defense and cannot properly be pleaded as a defense to this action.**

That this proposition is correct, see the following cases:

Dimock *vs.* Revere Copper Co., 117 U. S., 559.

Mechanics' Bank *vs.* Hazard, 9 Johns., 392.

Desobry *vs.* Morange, 18 Johns., 336.

Steward *vs.* Green, 11 Paige, 534.
Rudge *vs.* Rundle, 1 T. & C., 649.
Hollister *vs.* Abbott, 31 N. H., 442.
Bellamy *vs.* Woodson, 4 Ga., 175.
Wilkins *vs.* Warren, 27 Me., 438.
Rees *vs.* Butler, 18 Mo., 173.

The contention of the defendant in error to the contrary has been abandoned. Besides, it is certainly apparent from the second plea that the defendant in error is proceeding only on the theory that the Massachusetts court had no jurisdiction, and not that he has a defense to the judgment by way of release. If he wished to plead his discharge, he should have done so unequivocally and in an other plea.

## Conclusion.

It is believed that the cases and decisions cited in this brief show that the Superior Court of Suffolk County, in the State of Massachusetts, did not lose jurisdiction of the parties or the subject-matter by its improvident dismissal of June 12, 1899, and the expiration of the term, and that the said judgment of dismissal could be vacated at any time and without notice. This was no hardship on the defendant in error. He could not gainsay the court's action. The record showed the mistake, and, if he believed himself to be prejudiced, he could have, and should have, proceeded directly against the judgment herein sued on. It seems strange that the defendant in error should lay such

stress on the absence of notice, when there was nothing to litigate, no evidence *aliunde* offered, and when he himself had put it out of the power of the plaintiff in error to give him or his attorneys notice by removing from the jurisdiction of the court and taking up his residence in Colorado and having his attorneys withdraw their appearance. Notice would have been of no help to him, and his own voluntary act made notice impossible, for surely the case was not one in which notice could be given by publication. Moreover, it will be presumed, in the absence of a contrary showing, that courts of general jurisdiction have the power they assume to exercise, and that the mode of procedure adopted by them is authorized by the laws under which they act (Westervelt *vs.* Jones, Kans. App., 35). There was no fraud practiced upon the defendant in error. The delay in entering the judgment certainly did not amount to fraud, nor did his want of knowledge of the entry of judgment (Bellamy *vs.* Woodson, 4 Ga., 175, and Miller *vs.* Clements, 54 Tex., 351). Moreover, the delay from March 3, 1894, to July, 1898, was occasioned by the non-action of the defendant in error.

And, besides, he lost no rights and he was amply protected under the laws of Massachusetts both in proceeding directly against the judgment and in pleading his discharge in bankruptcy. But no; this is not what he wants. He wishes this court and the courts of this district to infer everything in his favor, and to give the plaintiff in error no opportunity to controvert any of his contentions in the courts of Massachusetts, where, with

propriety, they only can be raised. The Superior Court of Suffolk County, in the State of Massachusetts, did not lose jurisdiction, and that is the only point before this court.

It is therefore respectfully submitted that the judgment below should be reversed.

WILLIAM L. FORD,
*Counsel for Plaintiff in Error.*

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IN THE

# Supreme Court of the United States

October Term, 1906.

No. 144.

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BERTON O. WETMORE, ADMINISTRATOR OF THE ESTATE OF CHARLES H. WETMORE, DECEASED, TO THE USE OF JOHN F. McKAY,

*Plaintiff in Error.*

*vs.*

JAMES L. KARRICK,

*Defendant in Error.*

---

MILLAN AND SMITH.
J. J. DARLINGTON.
*For Defendant in Error.*

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## STATEMENT OF FACTS.

This is a writ of error from a judgment of the court below, overruling plaintiff's demurrer to defendant's second plea to an action of debt on a foreign judgment. The material facts of the case are as follows:

One Charles H. Wetmore, intestate of the nominal plaintiff, instituted suit against the defendant in error in the year 1892, in the Superior Court of Suffolk, Massachusetts, claiming $20,000 for certain alleged breaches of a contract between the parties. Various proceedings were had in the cause until the 12th day of June, 1899, when, there being a special verdict in favor of the plaintiff for $8,412.28, the

case was, at the call of the docket, dismissed by an order of the court, pursuant to its rules providing for such dismissal in cases in which no action had been taken within one year, which order, as is admitted by the pleadings in the case, was followed by a final judgment of dismissal on the first Monday of July, 1899. Thereafter, on October 18, 1900, which the pleadings further admit, was after an interval of more than five terms of the court, when more than two years had elapsed since any action had been taken in the said cause other than the said order and final judgment of dismissal, and more than fifteen months had passed since the order and judgment, the court, without summons, citation or notice of any kind to the defendant in error, or to anyone for him, and without his knowledge, assumed to strike out its said final judgment of July, 1899, and to restore the cause, on the ground that the same had been "dismissed improvidently, action having been taken within one year, but not discovered." Thereupon and thereafter, namely, on November 17, 1900, still without notice of any kind to the defendant, the court rendered judgment against him and in favor of the said Charles H. Wetmore for $12,-881.46, besides $40.46 costs.

On June 23, 1899, the defendant, who was then a resident of Colorado, filed his petition in bankruptcy in the United States District Court for that State, duly scheduling the debt sued upon in the Massachusetts action, and was duly discharged in bankruptcy by the said District Court from all his debts provable in bankruptcy at the time of the filing of his petition, which included the debt to the said Wetmore; and thereupon, after having obtained his discharge, he made inquiry of the Clerk of the Suffolk Superior Court as to the then status of the case, and was informed, in accordance with the fact, that the same had been dismissed, and was no longer pending against him, relying upon which dismissal he took no step to suggest his bankruptcy in said

suit, and was without knowledge of the subsequent proceedings therein until the action in the court below was brought against him, upon the judgment of the Suffolk Superior Court.

To the declaration in the court below upon the Massachusetts judgment, the defendant pleaded *nul tiel record*, and, as a second plea, the facts above recited, namely, the final judgment of dismissal in the Massachusetts court on the first Monday of July, 1899, his discharge in bankruptcy, his subsequent inquiry as to the status of the case, his ascertainment that the suit had been dismissed and was no longer pending against him, his consequent omission to suggest his discharge in bankruptcy in the said suit, its attempted restoration by the Massachusetts Court on October 18, 1900, after a lapse of five terms, without notice, of any kind, to him or to anyone for him and without his knowledge, and the subsequent rendition of the judgment against him in that court without process or other notice to him, or to anyone for him, without his knowledge, and without jurisdiction in the court, under the circumstances, to render the said judgment.

To this second plea, the plaintiff demurred on the ground, first, that the bankruptcy proceedings did not affect the jurisdiction of the Massachusetts Court over the original suit and the parties thereto; secondly, that the discharge in bankruptcy, having been granted prior to the rendition of the judgment sued upon, constitutes no defense; and, thirdly, that, the Massachusetts suit having been inadvertently dismissed by the court through a mistake of fact, the defendant was not entitled to notice of its restoration to the docket. The court below sustained the demurrer, which judgment was reversed by the Court of Appeals of the District of Columbia, and was followed by final judgment for defendant, the plaintiff electing to stand upon his demurrer, whereupon the plaintiff sued out his present writ of error to this court.

## QUESTIONS NOT INVOLVED.

It may render clearer the consideration of the case to eliminate, preliminarily, certain questions discussed in the opposing brief, but which, it is conceived, are not involved in or relevant to the controversy.

1. The first and second grounds for the demurrer assigned (Record, p. 37) are, that the jurisdiction of the Massachusetts court was not affected by the bankruptcy proceedings in Colorado, and, secondly, that the defendant's discharge in bankruptcy, antedating rendition of the Massachusetts judgment, is not a bar to the present action upon the latter. Neither of these questions is raised by the plea, nor, although in the opposing brief the defendant in error repeatedly is declared "now to have abandoned these questions," has he at any time presented them (Record, p. 53). The fact that, after obtaining his discharge in bankruptcy, he inquired into the status of the Massachusetts suit for the purpose of pleading his discharge as a defense, that he then learned of the judgment of dismissal in his favor, and that its subsequent attempted vacation, the reinstatement of the cause and the rendition of the judgment against him were all without notice, affording him no opportunity to plead his discharge, are pleaded as showing the want of jurisdiction of the court, and the injury and injustice to himself, according to the numerous authorities, presently to be cited, which limit the jurisdiction to correct after the term, even in the case of judgments erroneous through clerical misprision or the like, to cases in which correction can be made without injustice to or hardship upon any party to the cause or to third persons.

2. The opinion of the trial justice (Record, p. 34) holds that, no order appearing in the Massachusetts transcript authorizing withdrawal by the attorneys for the defendants of their appearance in the action, it may be presumed that

they continued to be his attorneys, and that notice was served upon them, notwithstanding the fact that such service is not shown by the record. This position was, of course, inadvertently taken by the learned justice, in oversight of the fact that the plea avers and the demurrer admits that the original judgment was vacated and the judgment sued upon substituted for it without "summons, suggestion or notice of any kind to this defendant, or to anyone for him."

3. The opinion of the trial court further holds, at page 40, that it may "attribute the erroneous order made to the mistake of the clerk, either in recording the minutes or in reading the record"; and the opposing brief, at page 18, affirmatively asserts, upon this argument of a demurrer to a plea, that the judge "as a matter of practice in the courts of Massachusetts does depend upon information given him by the clerk."

The duty of the clerk is to make his record correctly represent the proceedings in the case, and this it neither is nor can be claimed that he failed to do in the case at bar. The disallowance of the defendant's exceptions at the sitting of July, 1898, which constitutes the action taken within the year claimed to render erroneous the judgment of dismissal, was duly noted, and the record discloses that the judgment was stricken out, not on the ground of any omission of proper entries upon the record, but upon the ground of "action having been taken within one year, but not discovered." It is further to be noted that the action taken within the year was, not any act of counsel, or of the parties, the court's knowledge of which depended upon proper filing by the clerk, but action by the court itself, and duly appearing upon its own minutes.

No Massachusetts statute is cited, and it is believed none exists there or elsewhere, making it the duty of the clerk to ascertain and report to the court the state of the record as the basis of judicial action. The courts may, in ascer-

taining the facts in a cause, rely upon the clerk, or upon counsel in the cause, or upon their stenographers where, as in the District of Columbia, the law provides the judges with such assistants, whether such facts are shown by the docket entries, by depositions in the case, or otherwise; but it is impossible to hold that these are clerical duties, imposed by law upon such assistants, for their errors in which the court may at any subsequent term, however remote, vacate, without notice, a final judgment in favor of one of the parties, and substitute another against him, also without notice or opportunity to be heard.

4. The opposing brief, at pages 15, 28, insists that the defendant, upon discovery of the proceedings in question, should have availed himself of the provisions of the Massachusetts statutes, under which any person against whom a judgment is rendered may apply for a writ of review within one year from the entry thereof, or, if rendered in his absence and without his knowledge, within one year from his first notice of it. The brief assumes, without support either in the record or in fact, that the defendant has omitted to seek relief under these provisions in Massachusetts, and that his failure to do so has some bearing upon the question, in this cause, whether the Massachusetts court had jurisdiction to do the acts complained of or not. The record shows that the defendant's first knowledge of the Massachusetts judgment was the bringing of the suit against him in the courts of this District, under whose rules he was compelled to submit a valid defense, supported by affidavit, or to suffer judgment against him within twenty days after the service of process, to which judgment no further proceedings in Massachusetts would afford him any adequate defense. Nor is it quite intelligible why a party, not a resident of Massachusetts and without assets or interests there, should be required or expected to appear and engage in litigation there over a void judgment against him in the

courts of that State, as the condition of being allowed to show its invalidity when sued upon it in the courts of his domicile.

The Massachusetts court either had the jurisdiction, five terms after rendering a final judgment in the defendant's favor and discharging him without day, to render another judgment against him in the same cause, without notice, or it had not such jurisdiction. The jurisdiction, if it existed, was not conferred by the provision of the Massachusetts statutes allowing any defendant one year after the rendition of judgment against him within which to apply for a review; if there were otherwise no such jurisdiction, it can not be claimed to have been conferred by those statutes. And see Imp. Co. vs. Duffy, 67 Iowa, 175.

If, in Pennoyer vs. Neff, 95 U. S., 714, in which case this court applied the doctrine that a judgment upon a money demand against a defendant over whose person the court was without jurisdiction is void outside of the state in which it was rendered, the laws of that state had given the defendant the right to come in within a year after rendition of the judgment and have it re-opened; could it have been argued that such statutory right affected, in any way, the question of jurisdiction?

The claim that the case at bar is distinguishable from the one supposed, because in the case at bar there was originally personal service upon the defendant, is really to beg the question in the case; namely, whether the court retained the jurisdiction over the defendant acquired by the service of process, after the close of the term in which it rendered final judgment in his favor and discharged him without day. If the jurisdiction was then lost, the fact that it had formerly existed is without importance.

5. That the judgment of dismissal in June, 1899, was a final judgment is, also, beyond dispute, being removed from the field of discussion by the explicit ruling upon that

question of the Supreme Judicial Court of Massachusetts itself.

Thus, in Pierce vs. Lamper, 141 Mass., 20, a suit had been brought upon a promissory note, and had been dismissed upon the call of the docket, under the same rule governing the dismissal of the present case, which order of dismissal, under the rules, should have been followed by the entry of a judgment of dismissal, in lieu of which the clerk made only an entry on his docket, "September 12, 1882. Dismissed on call." *Held,* That, since it was the duty of the clerk to enter the judgment of dismissal, it is to be deemed in law to have been actually entered; that it was a final disposition of the case, and that the court "had no power" to vacate it at any subsequent term, or in any other manner than by a writ of review to vacate, filed within a year, under the statute. The opinion concludes: "It follows that the Superior Court has now no jurisdiction of the action, and that it should be dismissed."

To like effect is Wood vs. Payea, 138 Mass., 61, in which case there had been a judgment by default against the defendant by a court, whose terms were weekly. There was a mistake in the process issued and served upon the defendant, in that it named neither the hour of the day when, nor the place where, the court would be held. At the next term of the court, which was only the following week, the case was re-opened because of the mistake in the summons, but this was reversed by the Supreme Judicial Court, holding that there was no power to vacate a judgment duly entered, on motion, after the term in which it was entered, and that, while the court may correct any misprision of the clerk or other mistake, it could not "vacate a final judgment entered without any error or mistake, *in accordance with the order of the court.*" There had been error or mistake by the clerk in issuing the summons, but the judgment had been correctly entered, as the court had rendered and had intended to render it.

## CLERICAL ERROR OR MISPRISION.

In view of the discussion, in the opposing brief and elsewhere, of the cases in which, after the term, judgments and decrees may be corrected for clerical misprision or error, it may be well, also, to consider preliminarily what constitutes such misprision.

Chisson vs. Barber, 100 Ind., 1,

As shown by Makepeace vs. Lukens, 27 Ind., 435, at common law no amendment of any kind could be made after the term, for any purpose, or however formal it might be, the power of amendment being conferred by Stats., 14 Edw., III., 9 Edw. V., and 8 Henry VI., which gave authority to amend solely for "misprision of clerks." The court, in the case cited, say:

> "Under the authority of these statutes alone can amendments be made of the record when proceedings are no longer *in fieri*, and the term is past in which the record was made."

In Marsh vs. Nichols, 128 U. S., 605, 614-5, the Secretary of the Interior had omitted to sign letters patent granted for an invention; *held*, that this was not susceptible of correction as a clerical mistake. "A clerical error, as its designation imports, is an error of the clerk or a subordinate officer in transcribing or entering an official proceeding ordered to be entered."

So, in Leonis vs. Leffingwell, 126 Cal., 369, 372:

> "The test to be applied in determining whether an error in a judgment is of a judicial character, or a mere clerical mistake which may be corrected in the court where it was made at any time, saving intervening rights of third parties *and with due regard to equitable considerations*, is, whether the error relates to something that the trial court omitted to pass upon, *or considered and passed upon erroneously*, or a mere

> omission to preserve of record, correctly in all respects, the actual decision of the court, which in itself was free from error. If the difficulty is found to be of the latter character, it may be remedied as a mere clerical mistake, *which will not have the effect to change the judgment pronounced in the slightest degree, but merely correct the record evidence of such judgment.*"

In Villers vs. Parry, *et al.*, 1 Lord Raym., 182, a joint judgment had been given, and so entered, in an action upon a joint and several bond, the *scire facias* having been sued out against the defendants severally. Upon motion at a subsequent term to correct the judgment, making it several instead of joint, the court said:

> "If this had been a joint lien, the judgment may have been joint; but here the plaintiff by his several *scire facias* has made it a several lien, and therefore the judgment ought to be several. So it is plain error in law, and not amendable. But if it had been John for Thomas, this had been only *vitium clerici,* and amendable."

By the foregoing, and by authorities cited later and in the opposing brief, the following propositions are established:

1. No final judgment or decree can be amended at a term subsequent to its rendition, except for mere clerical misprision or error, which means error of the clerk to make the record speak the truth, or to show what judgment the court actually rendered or intended to render.

2. Even such errors can not be corrected where, to do so, would be unjust either to the adverse party or to third persons, at least without notice to the parties in interest and opportunity to be heard.

3. Any amendment of a different character, made without notice, is void, and may be attacked collaterally.

## POINTS AND AUTHORITIES.

Omitting further consideration of the several matters above discussed preliminarily, except in so far as the propositions last stated are referred to and considered in the authorities now about to be cited, we come to the principal and practically the only question in the case, namely: Did the Massachusetts court retain jurisdiction after the term in which it had rendered a final judgment, in the defendant's favor, and had thereby dismissed him without day?

Many of the authorities cited in the learned and exhaustive brief for the plaintiff in error are cases in which no such question was presented or decided, and which owe their pertinence only to general expressions used by the courts in reasoning to the decisions, upon other questions, rendered in them. But "general expressions of opinion, which are not essential to the disposition of a case, are not permitted to control the judgment in other suits." Harriman vs. Northern Securities Company, 197 U. S., 244, 291.

Thus Phillips vs. Negley, 117 U. S., 665, is cited and quoted, at page 11, only because of its reference to *The Palmyra,* 12 Wheat. 1, in which case it was said that to reinstate a case dismissed by mistake is one of the exceptions to the rule, than which none, it is declared, is better settled, that "no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term at which they have been rendered." The only point decided in Phillips vs. Negley is that, after the term, a judgment by default can not be re-opened, citing for the general doctrine upon the subject Bronson vs. Schulten, 104 U. S., 414, 415. The Palmyra case, and the character of the mistake to which it refers, will be discussed later.

So, at page 13, the opinion in City of Manning vs. German Ins. Co., 107 Fed. Rep., 52, is quoted at length, al-

though the only point decided in that case was that the court erred in setting aside a judgment and granting a new trial upon a motion filed after the term at which the judgment was rendered. The opinion, in passages not quoted, declares that the exceptions founded upon mistake or misprision of the clerk, "relate only to mere clerical errors," and that the errors remediable by the common law writ of error *coram vobis,* for which a motion is now substituted, "are limited generally to the facts that one of the parties to the judgment had died before the judgment was rendered, or was an infant, or no guardian had appeared or been appointed, or was a *feme covert,* or that there was error in the process, through the fault of the clerk."

Among other cases cited by the plaintiff in error are Portis vs. Talbot, 33 Ark., 218, in which the decision was, only, that a judgment entered against two defendants upon an appeal bond, which only one of them had executed, was a clerical misprision, clearly shown by other parts of the record, and which could, therefore, be cured; while in Sheepshank vs. Boyer, 1 Bald., C. C. R., 462; Sherbourne vs. King, 2. Cr. C. C. R., 205, and McCormick vs. Lessee of Magruder, 2 Cr. C. C. R., 227, judgments by default were stricken out after the term, because rendered through misprision of the clerk in failing to enter the appearance of attorneys, duly ordered. In Chase vs. Whilton, 62 Minn., 498, the correction was of a clerical error in a decree declaring a mortgage void both as to principal and interest, when the accompanying opinion, filed in the cause, had, in terms, directed a decree declaring the mortgage valid as to principal and void only as to interest—the correction being upheld on the ground that it only made the court's records conform to the judicial determination which the court had in fact made and intended to make. In Morrison vs. Stewart, 21 Ill. App., 113, a "mere slip of the pen" by which costs were entered as awarded to the defeated plaintiff, in-

stead of to the successful defendant, was corrected as "a mere clerical misprision rather than a judicial blunder."

In Dick vs. MacLaurin, 63 N. C. 185, and Stacker vs. Cooper Circuit Court, 25 Mo. 401, it is held, simply, that the court may at a subsequent term set aside an "irregular" judgment—defined as "one entered against the course and practice of the Court," or such as might be recalled by a writ of error *coram vobis*. It is an "irregular" judgment in the sense of the North Carolina decisions, as further shown by Wolfe vs. Davis, 74 N. C., 597, namely, one rendered contrary to the course and practice of the courts, as a judgment without service of process, which can be set aside at a subsequent term; while a merely erroneous judgment, rendered according to the course and practice of the courts, but contrary to law, will not be set aside. The judgment of dismissal in the case at bar, therefore, was not "irregular," but "erroneous," and incapable of being altered at a later term. The court, in July, 1899, adjudged, and intended to adjudge, that no steps had been taken in the case during the preceding year, and that the case should be, and was, finally dismissed. The judgment was erroneous, but "rendered according to the course and practice of the courts," curable by appeal, by application to the court within the term, or by petition within the year under the Massachusetts statutes, no one of which steps was taken. Further, the correction undertaken by the court in October, 1900, was, not to make the record conform to what was done or intended to be done in July, 1899, but to what the court in October, 1900, thought ought to be done—being directly the reverse of what it did or intended to do five terms before.

The inapplicability of Nave vs. Todd, 83 Mo., 601, will be apparent by reading into the quotation from that case, at page 24 of the opposing brief, where the asterisks appear, the following sentence, which the asterisks represent: "The

effect of the record is the same, and the defendant was not prejudiced." If the correction or alteration here were of that character, the defendant would unquestionably be without valid ground or objection.

In Capen vs. Inhabitants of Stoughton, 16 Gray., 364, cited at page 13 of the opposing brief, a sheriff's jury in condemnation proceedings having agreed upon a verdict awarding damages in favor of the owners of the property condemned, by mistake signed it in favor of the municipality, on which judgment was rendered without discovery of the mistake. The question principally discussed in the opinion is whether the testimony of the sheriff's jury could be received to impeach the verdict actually filed. The court (p. 368) held that it was "a case of manifest mistake of a mere formal and clerical character, which the court ought to intervene to correct, in order to prevent the rights of parties being sacrificed by a too blind adherence to a rule of evidence in itself wholly salutary and reasonable, but which, on principle, has no application to the present case; and (at p. 565-6) that "when no action has been taken, and the *rights of parties to the proceeding or those* of third persons can not be affected unjustly by the correction of an error, the court has power to order *a motion* to be brought forward and a judgment to be vacated in order that an entry may be made in conformity with the truth."

In the case at bar, there had been action taken, namely, the intended pleading of the discharge in bankruptcy had been omitted, because of and in reliance upon the judgment of dismissal, and the rights of the defendant were affected unjustly in subjecting him to a judgment on a claim against which he had a valid defense, which defense he was deprived of the opportunity to present.

With respect to the text-book quotations or references in the opposing brief, 1 Tidd's Pr., 512, cited at page 22, is authority only for the proposition that irregularity in the

process, or in the notice to appear, etc., are to be brought to the attention of the court by motion, on proper affidavit, to set aside the proceedings. The reference is, manifestly, to notice given irregularly, and not to failure to give notice at all. Process and notice are treated as entirely alike; so that, if the plaintiff is correct in his view that the remedy of one against whom a judgment has been rendered in a cause once dismissed and then re-instated without notice is by motion to vacate, appeal or petition for a writ of review, then equally, upon this authority, only that remedy is available to one against whom judgment has been rendered without the service of process.

Freeman on Judgments, Sec. 135a., cited at page 18 of plaintiff's brief, is simply to the effect that, where jurisdiction has once been obtained over the person or the subject matter, no error or irregularity *in its exercise* can make the judgment void—not that, after the jurisdiction, though once acquired, has been terminated by a final judgment and the defendant dismissed without day, the court may at a later term proceed to annul that judgment and render another, against, instead of for him, and without regaining jurisdiction over him by some appropriate process or proceeding. The same author, at Section 98, says: "Judgment having been entered in an apparently legal manner, and the jurisdiction not being retained by any motion or proceeding taken, either during the term or within the time allowed by some statute, the court loses all control over the action and parties." And, again, at Section 103: "At the close of the term, the parties are dismissed *sine die,* and can no longer be regarded as being in court. Proceedings taken after that time to set aside a judgment must, therefore, be upon notice to all the parties interested."

Black on Judgment, Section 328, quoted, at page 21, to the effect that a judgment inadvertently or irregularly entered by *the judge* or the clerk *without any authority* may

be vacated at any time. The brief, although noting the fact that the author cites authorities for his text, does not refer to them, possibly for the reason that no one of them sustains the text with respect to inadvertent entries of judgments by the judge—though, if done "without any authority," it would, no doubt, be wholly void, and therefore proper to be disregarded by all courts—except, under decisions of this court presently to be cited, the court which rendered it. Of the authorities cited in the section of Black on Judgments referred to, Merrick vs. City of Baltimore, 42 Md., 219; Wharton vs. Harlan, 68 Cal., 422, and U. S. vs. McKnight, 1 Cr. C. C. R., 84, were cases of misprision on the part of the clerk. Wolfe vs. Shenandoah National Bank, 84 Iowa, 138, was a case in which the decree recited personal service upon the defendant, when the record showed that the service was not upon him, but upon his wife, the court holding, simply, that this jurisdictional fact, namely, the absence of personal service, might be shown, and, "when established in a proper proceeding, the judgment would be set aside." Coleman vs. Floyd, 131 Ind., 330, was the reversal of the lower court for refusing to set aside a judgment against defendants for non-appearance for trial at a court to which the venue had been changed without notice to them, and is, therefore, an authority in favor of, rather than against, the present defendant in error.

In Vanderpool vs. Vanderpool, 162 Pa. St., 394, the suit in which judgment was rendered had been brought without the knowledge or consent of the plaintiff, who joined with the defendant against whom it had been rendered in asking its vacation, and gave an order to enter it satisfied. There was no claim that its rendition had been irregular, or the result of inadvertence on the part of either the clerk or the court; but, nevertheless, the court refused to set it aside except on terms of satisfying persons who had become equitably interested in it.

Examination of the above mentioned authorities cited by the plaintiff, which embrace the major part of his citations, discloses, therefore, that these relate to the correction of judgments for clerical errors, or to judgments rendered "irregularly" in the sense of being contrary to the course and practice of the court, without legal authority or jurisdiction, as distinguished from judgments rendered through error in fact or law; and that, in them, the correction at a later term consisted in striking out or disregarding them where they were, not merely erroneous, but void—in all other cases, neither reversing nor modifying any judicial decision nor correcting any judicial error, but only making the court's record conform to the judicial determination which it had in fact made or intended to make—extending only so far as to make the record speak the truth, causing it to show what was done, and not what, at a later term, the court may be of opinion it ought to have done.

It is quite obvious that decisions of this character throw no light on the question now under consideration, namely: Whether a court, having rendered, though erroneously, a final judgment in a cause in favor of the defendant, discharging him *sine die* from further attendance, and the term at which such judgment was entered having expired without any motion or other proceeding to vacate the judgment or re-open the case, the court may, at any indefinite number of terms thereafter, vacate the judgment so rendered in the defendant's favor, and substitute for it a money demand against him, without notice or other opportunity to make defense.

We have next to consider whether the remaining citations of the plaintiff sustain the affirmative of this question, those authorities being *The Palmyra*, 12 Wheat. 1, Alviso vs. U. S., 6 Wall., 457; Sibbald vs. U. S., 12 Pet. 488, 492; Westervelt vs. Jones, 5 Kans. App., 35, and Hunt vs. Yeatman, 3 Ohio, 16.

The cases principally relied upon are *The Palmyra*, 12 Wheat., 1, and Alviso vs U. S., 6 Wall., 457.

The *obiter* in each of the authorities already considered, including Phillips vs. Negley, in support of "reinstating a case dismissed by mistake," as one of the exceptions to the well settled and practically universal rule that a court can not reverse or annul its final decrees or judgments for errors of fact or law at a later term, rests upon the former of these cases; and it becomes important, therefore, to ascertain the *kind* of mistake referred to in *The Palmyra* and in Alviso vs. U. S., as, also, whether those cases are authority for action, as in the case at bar, without notice.

As to the first of these questions, the mistake in both cases was caused by clear misprison upon the part of the clerk. *The Palmyra* case was dismissed because this court, upon looking into the record, found that, according to it, there had been no final decree below, and that, therefore, the case was not appealable. At the next term of the court, the appellant submitted a corrected transcript, showing that there had been a final decree, which the clerk through misprison had failed to include in the record; and it was for this mistake, not of the court, but of the clerk in making up the transcript of the record, that the order of dismissal had been made. So, in the Alviso case, this court, upon examination of the transcript of record, found there had been no citation signed and served upon the appellee, for which reason it dismissed the appeal; whereupon, at the succeeding term, it was shown that there had been such citation, duly signed, served and filed, and that it had been omitted from the record through error upon the part of the clerk.

With respect to notice, while the report of neither case shows that notice had been formally given, the report of the former case, in 12 Wheat. 1, and that of the Alivso case in 6 Wall., 457, show that the adverse party was present in court, when the applications to vacate the dismissal were

presented, and argued against them, making it plain that there was notice and the opportunity to be heard.

Upon the subject of notice, it is argued, on behalf of the plaintiff here, as below, that, if the court had the jurisdiction to reinstate at all, it could do so without as well as with notice; or, at most, that the omission to require notice was simply error, precluding collateral attack. As pointed out in the opinion of the Court of Appeals, however, at page 55 of the Record, this position is not maintainable. At common law the application must have been made by writ of error *coram vobis,* which writ must have been served in order to give jurisdiction to the court; and, this being true, it follows that the modern substitute for that writ, the motion, must be accompanied by notice, answering the purpose of the service of the writ. This being true, it follows that notice of the application is, necessarily, jurisdictional.

Further, in Rice vs. R. R. Co., 21 How., 82, upon precisely the same state of facts as in *The Palmyra,* namely, the dismissal of an appeal by this court because, upon inspection by it of the transcript, no final judgment appeared, and application at the next term of the court for reinstatement upon the showing that there had been a final judgment, which had been simply omitted by the clerk, the court held that, when the term at which the dismissal was ordered had closed, "that decision was final so far as concerned the authority and jurisdiction of this court under that writ"; and, to the argument that reinstatement had been ordered in the case of *The Palmyra* under precisely similar circumstances, the court distinguished the cases on the ground that Rice vs. R. R. Co., like the case at bar, was a common law action, while *The Palmyra* was an admiralty case, "where the power and jurisdiction of an appellate court is much wider upon appeal than in a case at common law, for in an admiralty case you may in this court amend the pleadings and

take new evidence, so as to make it in effect a different cause from that decided by the court below, and the court might well, therefore, deal with the judgment and appeal of the inferior tribunal in the same spirit. But the powers which an appellate court may lawfully exercise in an admiralty proceeding are altogether inadmissible in a common law suit."

In the opposing brief, some distinction is attempted between *The Palmyra* and Rice vs. R. R. Co., on the ground that, in the latter case, the court simply held that the writ of error was *functus officio*, and that it was not returnable to the term at which the application to reinstate was made. These distinctions, however, are not the ground assigned by the court for the difference in the two rulings, nor do they serve in any way to distinguish the principle of the latter case from the case at bar.

The Alviso case, also, while not an admiralty case, was not a suit at law, but a proceeding of an apparently anomalous character, to approve a survey of a confirmed Mexican land claim. See 8 Wall, 337.

As before noted, Phillips vs. Negley, 117 U. S., 665, decided only that a default judgment could not be set aside upon a motion offered at a later term, and is cited only because of its reference to *The Palmyra* case. Sibbald vs. U. S., 12 Pet., 488, 492, also cited in Phillips vs. Negley, affords no support to the demurrer other than a similar reference to *The Palmyra* case, holding that, unless for clerical mistakes, or in so far as upon the authority of *The Palmyra* case a cause dismissed by mistake can be reinstated, no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term at which they have been rendered, "from which it follows that no change or modification can be made that may substantially vary or affect it in any material thing." This citation, it is obvious, is fatal to the demurrer, if we are right in our contention

that *The Palmyra* case is not applicable to the facts and circumstances of the case at bar. The decision is explicit that no court can reverse or annul its own final decrees or judgments after the term at which they have been rendered, "for errors of fact or law." The controversy here is over an attempt by the Suffolk Superior Court to annul its own final judgment, and to substitute a diametrically different judgment for it, at the fifth term after its rendition, for an error of fact, proved by its own minutes, it is true, but not distinguishable in that respect upon any principle from an error of fact proved by depositions in a cause or other evidence of record.

The remaining decisions cited in support of the demurrer are from the state courts, and are even less applicable. Westervelt vs. Jones, 5 Kans. App., 35, was a suit in Kansas upon a New York judgment against L. M. Jones, J. L. Jones, and others. The transcript of the New York record showed a stipulation of dismissal as to L. M. Jones and J. L. Jones, followed by dismissal as to them, entered in accordance with the stipulation, notwithstanding which stipulation and dismissal the final judgment was against them as well as the other defendants. The court simply overruled a demurrer to the declaration based upon this ground, holding that, "in the absence of any showing to the contrary, it would be presumed that the case had been reinstated" as to the defendants Jones, giving them leave to plead, so that the contrary might be shown. The case, it will be seen, presents no question as to the power of the court to vacate the judgment after the term, whether with or without notice, nor any other question presented by the present record.

Hunt vs. Yeatman, 3 Ohio, 16, 23, holds that a judgment may be set aside at a subsequent term for irregularity. What the irregularity was, and whether there was or was not notice, does not appear in the case. In Reynolds vs. Stansbury, 20 Ohio Rep., 344, 353, however, the majority

opinion holds that there may be such action at a subsequent term, though it is necessary that the adverse party should have notice *in order to give the court jurisdiction*, and that, in the case of courts of general jurisdiction, the presumption in favor of jurisdiction should be indulged; while in the later case of Hettrick vs. Wilson, 12 Ohio St., 137, it is held that notice to the other party was necessary to give jurisdiction at one term to vacate a judgment rendered at a prior term, and that in such case the notice, being jurisdictional, could not be presumed, but must appear affirmatively. "A judgment, final in its character, had been rendered in the case at the May term of the court. By that judgment the defendant was acquitted, and dismissed without day. At the close of the term, he was no longer in court. No further action could be taken in the case prejudicial to his interests without notice to him. The plainest principles of justice as well as the provisions of the Code require this. * * * However far we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the error complained of appear affirmatively, by exception or otherwise, yet no such presumption can be admitted to prevent the direct impeachment of a judgment, where the subject of complaint is that the party has had no day in court, and so had no opportunity of placing anything on the record."

It is true, as claimed at page 35 of plaintiff's brief, that in Hettrick vs. Wilson, the court also found notice to be required by a statute in force in Ohio; but, as will be seen from the above quotation from the opinion, and from the opinion itself, its decision was based equally upon the common law, and was not at all dependent upon the statute.

The foregoing summary embraces, it is believed, all the cases cited in the plaintiff's brief upon the proposition pre-

sented by this case, and which has already been so frequently stated, namely: Has the court, after having once entered a final judgment for the defendant, though through an error of fact, thus discharging him *sine die*, jurisdiction at a remote subsequent term, without notice to him, to annul the judgment in his favor and to render another, upon a money demand, against him in its stead? No one of the cases cited, it will be seen, goes to that extent, or is authority for that proposition; while the case last cited, Hettrick vs. Wilson, is precisely in point to the contrary, except that in that case the want of notice was presumed from the absence of evidence of it in the record, while in the case at bar want of notice is affirmatively averred in the plea and admitted by the demurrer.

*Further Authorities on Behalf of Defendant in Error.*

In Morgan vs. Campbell, 54 Ill. App., 242, it is held that, by an order of court dismissing the suit, the parties are out of court, jurisdiction over them is at an end, and they stand as they did before the commencement of the suit; and that, the jurisdiction having been thus once lost and the term passed, the record must show that it was regained, and how, and that the failure of the record to show notice of any motion to reinstate at a subsequent term, is fatal.

So, in Swift vs. Allen, 55 Ill., 303, an amendment to a decree, at a subsequent term, although made pursuant to a verbal notice to the defendant's solicitor, was declared, in a collateral suit, to have been a nullity. "The court acted without jurisdiction. It could no more impair his rights by an order made in the cause of an amendment, without first bringing him before the court, than it could do so by producing a new decree. The order making the amendment was not merely erroneous, as suggested by counsel. It was absolutely void for want of jurisdiction, and can be assailed in a collateral as well as in a direct proceeding."

So in Bryant vs. Vix, 83 Ill., 1: "By the order dismissing the cause, the parties were out of court, jurisdiction of the court over them was gone, and they stood as they were before the suit was commenced * * * Jurisdiction having been once lost, and the term passed, the record must show that it was regained, and how, or the judgment has no basis."

In Board of Commissioners vs. Brown, 14 Ind., 191, an appeal had been dismissed, and the cause reinstated at a subsequent term without notice. The court said: "Upon the dismissal of an appeal, the parties are no longer in court; and the refiling is the institution of a new suit, at least so far as to require that notice shall be given to defendant."

In Jenkins vs. Corwin, 55 Ind., 21, a judgment rendered at one term was set aside at a subsequent one, and a new trial granted. Upon the question of the validity of the subsequent judgment, being the same question we have here, the court said: "When the original judgment was rendered, and the term of court had passed, the parties were out of court; and no motion to set aside the judgment and grant a new trial could have been entered without notice to the opposite party. The order granting a new trial was made, apparently, without notice to the defendant in the original action; and, if so, it was not erroneous merely, but utterly void.

So, in Perkins vs. Hayward, 132 Ind., 95, 100, the court declares that, after a final judgment, the cause remains on the docket only to carry into effect the judgment actually rendered, not for any action modifying or changing it. After the term, "the court can make no order changing, modifying or correcting the judgment, except upon notice, again bringing the parties before it, or upon their voluntary appearance."

And in Durre vs. Brown, 7 Ind., 127, 132, the court say: "After the term has closed and the proceedings have ceased

to be *in fieri*, no legal steps can be taken against any party who has a substantial interest in them *except after notice given*. See also Elsner vs. Shirgley, 80 Iowa, 30; Montgomery vs. Merrill, 36 Mich., 97; Stringer vs. Echols, 46 Ala., 61.

"A judgment is *finis litium*, and parties are not required thereafter to keep counsel on hand at the succeeding terms of the court lest an order affecting the judgment should be made." * * * While all orders and judgments are *in fieri* during the term at which they are made, and may be modified or set aside at such term without notice, after such term a final judgment cannot be set aside *except upon notice given.*" Harper vs. Sugg, 111 N. C., 327.

And so, in Kenny vs. Lyons, 21 Iowa, at p. 280, a motion to vacate an order dismissing a bill being granted at a subsequent term, without notice to the adverse party, the court declared it to be a violation of a fundamental principle of judicial proceedings. "After the original case was settled and dismissed, he was out of court, and was not bound, after the adjournment of the term, by anything that might be done affecting his interests, until notified of such contemplated action."

"After expiration of the term, however, the court has lost jurisdiction of the parties, and an order made upon motion, without notice, is void." 14 Encycl. Pl. and Pr., 27.

"A decree at a subsequent term vacating a final decree entered at the preceding term, and without notice to the other parties, is void on its face." Hook vs. Mercantile Trust Co., 89 Fed. Rep., 410—the question arising in a collateral suit.

Where there had been a final judgment in a cause, and no motion made or proceeding had during the term to set it aside, "the litigation was at an end upon the adjournment of the term, and the successful party discharged from further attendance." Hume vs. Bowie, 148 U. S., 245, 255.

And see Trust Company vs. Grant Locomotive Works, 135 U. S., 224.

At pages 8 and 9, and elsewhere in the plaintiff's Brief, it is reiterated that he does not wish to be understood as questioning in any way the proposition that a final judgment, entered "regularly and not through mistake or inadvertence," can not be vacated after the expiration of the term, and that this rule applies to judgments of dismissal as well as to any other judgments; but, it is contended, this rule does not apply to judgments of dismissal based upon mistake or inadvertence. No authority or reason is cited why judgments of dismissal differ in this respect from any other final judgments. U. S. vs. Sibbald, cited above, declares, in terms, that neither error of fact nor of law in the rendition of the judgment will confer such jurisdiction at a later term, except in the excepted cases, which, we submit, it has been shown are not applicable to the present case. Nor are authorities wanting in the precise case, namely, that of judgments of dismissal rendered through mistake, and sought to be vacated on that ground at a subsequent term.

In American Burial Company vs. Shaughnessy, 59 Miss., 398, 400, the trial court had dismissed the action at the first term after suggestion of the death of the plaintiff, because of the failure of appearance by the personal representative. This action was a mistake on the part of the court, the Code allowing the personal representative until the second term after the suggestion of death within which to appear. At a subsequent term, the court vacated the order of dismissal, and allowed the case to proceed to judgment. *Held*, that "an order of dismissal is a final judgment, and puts an end to the jurisdiction of the court"; that the judgment of dismissal was erroneous, but not a nullity; that it was "a final disposition of the case, and, until reversed on appeal, deprived the court *of all further jurisdic-*

*tion* over the subject-matter," and that, as a result, the order of reinstatement, and all subsequent proceedings in the case, *were void.*

In Jameson vs. Kinsey, 85 Mo. App., 298, the trial court had dismissed the suit because of plaintiff's failure to comply with an order to give security for costs, in forgetfulness or oversight upon its part of a statute which exempted him from such a requirement. Two terms later, the court granted his motion to vacate the judgment of dismissal and to reinstate the cause, without notice to the defendant, and followed this up by rendering a judgment in plaintiff's favor. A statute permitted the granting of motions to set aside judgments "for irregularity," if made within three years after the trial at which they were rendered. *Held*, that, in rendering the judgment of dismissal, the court did not violate any prescribed rule or mode of procedure, but simply committed an error of judicial discretion; that this ruling was regularly made, when it was in full possession of jurisdiction of the persons of the litigants and of the subject matter of the action, and might have been corrected upon appeal or writ of error; that it was not, consequently, an irregularity, but a judicial error, not correctible after the lapse of the term, even under the authority given by the statute to set aside a judgment for irregularity; and that the subsequent judgment vacating the dismissal and reinstating the cause "was a simple nullity, for want of jurisdiction to render it." To the like effect is Ewing vs. Perry, *et al.*, 35 Tex., 778.

Where the judgment entered was the one the court intended to enter, and the facts found were those which the court intended to find, there is no case of clerical mistake, and the case does not come within the rule that a court, after the expiration of the term, may amend the record by inserting what had been omitted by the act of the clerk or of the court. Hickman vs. Fort Scott, 141 U. S., 418.

In Wright, Petitioner, 134 U. S., 143, the court cite, approve and follow Section 1160, 1 Bish. Crim. Proced., as follows: "When the term of the court is closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of the court, for instance, can not then be opened and modified or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the *clerk,* proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited, and not easily defined. In general, mere clerical errors may be amended in this way." In the case at bar, the act of the Massachusetts court in question was, not to supply any omission in the entry of what was done, nor to amend any clerical error, but "to undo, at a subsequent term, what was done at the former term."

In Grames vs. Hawley, 50 Fed. Rep., 319, the court held that an order of discontinuance, though made by the court in pursuance of an agreement fraudulently obtained by one of the parties, was in the nature of a final order, disposing of the case, exhausting the power of the court over the action and the parties, and that the jurisdiction could not be resumed over either at a subsequent term without a new proceeding, and the service therein of original process, citing a number of Federal and State authorities.

In Elder vs. Richmond Mining Company, 58 Fed. Rep., 536, an order vacating a judgment of dismissal rendered at a prior term, followed by a judgment for the plaintiff, was held to be "not merely erroneous, but was absolutely void for want of jurisdiction. This is not the case of the correction of a mere clerical error, or supplying a previus omission, or the amending of a judgment to make it conform to

the judgment actually rendered, or intended to be rendered, which may sometimes be done, upon proper notice. But the power of amendment after the term does not extend to the correction of judicial errors, or the rendition of a judgment which was neither in fact rendered nor intended to be rendered. (1st Black Judgm., Sec. 154.) In this case, no mere correction of a clerical error or amendment of a judgment was asked for, or attempted to be made. There was an entire annulment of the first judgment, and the rendition of another judgment, the very opposite of the one set aside. The case having been finally disposed of years before, it passed out of the court's jurisdiction; it could neither vacate the first judgment nor render a new one. The judgment of every court acting without jurisdiction is a nullity, and will be so treated in all courts in which it is sought to be used or relied on as a valid judgment."

In the above case, the original judgment of dismissal, the subsequent order of vacation, and the final judgment for plaintiff, were in a Colorado State court. The above decision by the Circuit Court of Appeals, Eighth District, was rendered upon a bill filed, in the Federal Court, to remove the apparent cloud created by the judgment upon the complainant's title. The court held that it was without jurisdiction to review errors in the State Court, but that the judgment vacating the dismissal, and the subsequent proceedings, were "absolutely void, as rendered without jurisdiction."

In Arrowwood vs. Greenwood, 5 Jones Law, 414, a defendant who had already filed a required bond was, through the court's overlooking the fact, put under rule to give such bond, the case dismissed for his omission to do so, and, at a subsequent term, a motion to reinstate was granted. *Held,* erroneous, and the order reversed, on the ground that the order of dismissal was, not void, but merely erroneous, "because of a fact which was not presented to the court, and of which it did not have cognizance. The only way such an

error could be corrected is by writ of error for matter of fact, in respect to which there is a specific time allowed by the court." In Arnold vs. Kendrick, 50 Ga., 292, a case was inadvertently dismissed for failure to pay certain taxes, the proof of such payment being then on file, but overlooked. At a subsequent term a motion to reinstate being overruled, the Supreme Court affirmed this action, declaring the dismissal to have been simply error, and to be remedied accordingly.

In no one of these cases, nor in Villers vs. Parry, 1 Lord Raym., *supra,* was the correction held maintainable on the ground of presumption that the clerk had failed to "read the record correctly" to the court, or that any such duty, clerical or otherwise, legally rested upon that officer.

In Hubbard vs. Welsh, 11 Ark., 151, a bill was inadvertently dismissed for want of an affidavit, no affidavit being in fact required by law. *Held,* that the order of dismissal could not be set aside at a subsequent term, being conclusive upon the parties after the term at which it was rendered, and not subject to revision.

In Jameson vs. Hilton, 85 Mo. App., 398, a judgment of dismissal had been inadvertently rendered for failure to give security for costs, the statute expressly exempting the plaintiff from such requirement, and another statute permitting application to set aside a judgment in any court of record "for irregularity," at any time within three years after rendition. The plaintiff moved to vacate, which motion was granted, and judgment entered in the plaintiff's favor. *Held,* that, while the dismissal was clearly error, it was not an "irregularity." "Such errors of judicial discretion are not correctible after the lapse of the term under the authority given by the statute to set aside judgments for 'irregularities.' * * * The judgment of the trial court setting aside its previous dismissal of plaintiff's action and rein-

stating the same, was a simple nullity, for want of jurisdiction to render it."

In Cameron vs. McRoberts, 3 Wheat., 591, a final decree had been rendered in a case in which the court had no jurisdiction, because the record did not exhibit a case of diverse citizenship; *held,* even in such a case, upon motion at a subsequent term to set aside the decree and dismiss the suit because of clear want of jurisdiction apparent on the record, that "the court had not power over its own decree, to set aside the same on motion, after the expiration of the term at which it was rendered." Surely a mistake by a state court in failing to recall or discover its own action in the cause within the year, involving no right of jurisdiction, but simply the propriety of a judgment of dismissal, does not present a case stronger than mistake by a federal court in failing to discover the absence of the necessary averment in the record of diverse citizenship, upon which its jurisdiction to render any judgment at all was wholly dependent.

"After the court has adjourned, its judgments, however erroneous, can not be reversed by the same tribunal, except for mere clerical defects or omission." Gibson vs. Wilson, 18 Ala., 63.

After the term, the only control of courts over their records is to "correct them so as to make them set forth whatever act the court performed." Printing Co. vs. Green, 52 Ohio St., 489, 493.

After the term, the power of courts over their records "is confined to errors and mistakes of their officials"; and the exercise of it "involves two requisites, first that there has been some action of the court which might properly and should have become part of the record in that cause; secondly, that the omission from the record was through the fault or mistake of the clerk." R. R. Co. vs. Holbrook, 72 Ill., 419.

Where the judgment entered was the one the court intended to enter, and the facts found were those the court intended to find, there is no case of clerical mistake permitting amendment after the term. "If errors exist, they can only be cured by such proceeding, by writ of error or appeal, as may be allowed in a court which, by law, can review the decision." Hickman vs. Fort Scott, 141 U. S., 415, 418-19 and citations.

In Bank of the United States vs. Moss, 6 How., 31, 38-9, after stating that the court may, after the term, set right mere forms in its judgments, correct misprisions of its clerks and irregularities in notices, mandates and similar proceedings, allow amendments permissible under the Statutes of Jeofails apply the verdict to a good instead of to a bad count where its minutes show the evidence offered to the former, or revoke entry of a mandate directed through mistake, arising from omission from the record of the marshal's return showing citation had not been served, this court declares: "Nothing else appears to justify the court in going back to a final judgment of a previous term and summarily setting it aside for an error in the law *or the facts,* and dismissing the whole case from the docket." Still less in summarily setting aside a judgment in a defendant's favor and entering instead a large money judgment against him.

It can not be necessary further to multiply authorities upon the question in controversy. It is plain that no one of the numerous authorities cited on behalf of the plaintiff in error affords support for his demurrer, under the facts of the present case, and that the authorities supporting the judgment of the Court of Appeals are numerous, pertinent, and in conformity both with legal principles and with the plainest requirements of justice.

## The Right to Notice.

Upon this subject, discussed at pages 24 to 38 of plaintiff's Brief, enough has perhaps already been said. Where the correction consists merely in making the entry of the judgment conform to what the court did or intended to do, as shown by the record, it may well be in many instances that notice is unnecessary. Of this character are the cases, cited by plaintiff, of Odell vs. Reynolds, 70 Fed. Rep., 656 (see Record, 56); Groton Bridge Co. vs. Brick Co., 126 Fed. Rep., 552; Emery vs. Whitwell, 6 Mich., 474; Emery vs. Berry, 28 N. H., 473; Balch vs. Shaw, 7 Cush., 282; Mann vs. Schroer, 50 Mo., 306; Nave vs. Todd, 83 Mo., 601, etc. In Walden vs. Craig's Heirs, 14 Pet., 147, not only was notice held presumable (pp. 154-5), but the decision proceeded on the further ground that the amendments permitted were for the purpose of giving effect to the judgment, and that for this purpose, after the judgment, the parties are still in court—differing in this respect from a judgment of dismissal, which, on the expiration of the term, discharges the defendant without day and terminates jurisdiction over him. In few if any cases, even of this character, however, is notice held to be unnecessary, if the amendment really changes the legal effect of the judgment as originally entered.

Even where the correction is of the character stated, the jurisdiction to make it exists subject to the qualification that the rights of the parties, or of third persons, are not unjustly affected; it is to be exercised with great caution and with strict regard to the rights of others (Stickney vs. Davis, 17 Pick., 169), with due regard to the rights of parties and third persons. Moore vs. Hinnant, 90 N. C., 163. Where these are concerned, there must be notice to the parties in interest. R. R. Co. vs. Holbrook, 72 Ill., 419; Coughran vs. Gates, 18 Ill., 390.

The authorities cited by plaintiffs are to the same effect. "That notice thereof should be given to the party affected thereby seems but plain justice," Groton Bridge Co. vs. Brick Co., 126 Fed., 552. "The general rule is well established that a judgment can not be amended, after the term in which it was rendered, upon *ex parte* application. A proper notice must be given to the opposite party of the application and the relief asked." Black on Judgments, Sec. 164. When the rights of the parties to the proceeding can not be unjustly affected, the court has power to order an entry made in conformity with the truth. Capen vs. Stoughton, 16 Gray, 364. "All the subsequent proceedings, without consent, were *coram non judice* and void." Manning vs. Ins. Co., 107 Fed. Rep., 52.

Even during the term at which it is entered, the plaintiff can not have a judgment of dismissal set aside without notice to his adversary. Parker vs. Johnson, 20 Mo. App., 516.

In Blake vs. McMurtry, 25 Neb., 290, where a decree was amended after the term, without notice, *Held*, that the court had lost jurisdiction over the defendant by the original decree, and the amendment was void. And see Homan vs. Hellman, 35 Neb., 414.

In Insurance Company vs. Duffy, 67 Iowa, 175, the plaintiff had elected to stand upon an overruled demurrer, and judgment was accordingly entered for the defendant, whose attorney then left the court room, after which the plaintiff changed his mind and the court, without notice, set aside the judgment and gave leave to amend. *Held*, on *certiorari*, that, while the court's action, unlike that in the present case, may have been in accordance with substantial justice, the controlling question was one, not of substantial justice, but of jurisdiction; that, while the court retained jurisdiction over the defendant for the purposes of a motion for a new trial within the time allowed therefor, it ceased to

have jurisdiction over him otherwise, on entry of the final judgment in his favor, and that the expunging order was to be regarded as never having been made.

In the case last cited, the plaintiff urged that the defendant should have availed himself of his right, under a statute, to move to set aside the expunging order at the following term—just as the plaintiff in error here insists the defendant should have availed himself of his right of petition for review within the year after he discovered the action taken in October, 1900. The court said: "It is true the defendant, when it obtained knowledge of the order, might have moved the court at the succeeding term to set it aside. But the defendant was not bound to do this if the court did not have jurisdiction to make the order at the time it did so."

In Warren vs. Farquarharson, 4 Baxt., 484, a judgment of February, 1861, was entered satisfied in 1862, upon payment in Confederate money, which the court set aside in 1866, and revived the judgment; *held*, without jurisdiction and void. "If the court could do this, without notice, three years after the satisfaction was entered, it might be done ten years afterward."

In Swift vs. Allen, 55 Ill., 303, a decree at one term, dismissing a bill generally, was amended at the next, the amendment being only to show the ground of the dismissal, clearly "within the breast of the court," to have been that there was an adequate remedy at law; *held*, void. "The amendment having, thus, been made without notice to the defendant in this suit, it is as to him a nullity. The court acted without jurisdiction. It could no more impair his rights by an order made in a case of an amendment, without first bringing him before the court, than it could do so by pronouncing a new decree. The order making the amendment was not merely erroneous, as suggested by counsel.

It was absolutely void for want of jurisdiction, and could be assailed in a collateral as well as in a direct proceeding."

What the court thus regards as *reductio ad absurdum*, namely, the granting of a new judgment or decree, without notice, after the term in which a final decree has already been rendered, is precisely the action which the plaintiff in error is here to insist is valid.

After the term, "the court can make no order changing, modifying or correcting the judgment, except upon notice, again bringing the parties before it, or upon their voluntary appearance." Perkins vs. Haywood, 132 Ind., 95, 100. Equally to the point are Bryant vs. Vix, 83 Ill., 1; Board vs. Brown, 14 Ind., 191; Jenkins vs. Conner, 55 Ind., 21 Durre vs. Brown, 7 Ind., 127, 132; Elsner vs. Shirley, 80 Iowa, 30; Montgomery vs. Merrill, 36 Mich., 97; Stringer vs. Echols, 42 Ala., 61; Harper vs. Sugg., 111 N. C., 327; Kenny vs. Lyons, 21 Iowa, 280. See, also, many authorities cited *supra*, under the principal question discussed.

As above noted, a court at common law could regain jurisdiction over parties out of court under a final judgment rendered by itself at a prior term, for correction of error or mistakes of fact, only by a writ of error *coram vobis*, served upon the adverse party; the writ being succeeded in modern practice by motion, and the service of it by notice. No authority is cited in the opposing Brief, and it is confidently claimed none exists, holding that a final judgment in favor of a party at one term may be displaced by a heavy money judgment against him at another and long subsequent one, without motion and notice, or opportunity to be heard.

The judgment below, it is respectfuly submitted, was wholly in accord both with legal principles and the absolute requirements of common justice, and should be affirmed.

MILLAN AND SMITH,
J. J. DARLINGTON,
*Attorneys for Defendant in Error.*

# Supreme Court of the United States.

No. 144.—October Term, 1906.

Berton O. Wetmore, Administrator of the estate of Charles H. Wetmore, deceased, to the use of John F. McKay, Plaintiff in Error,
*vs.*
James L. Karrick.

In error to the Court of Appeals of the District of Columbia.

[March 11, 1907.]

Mr. Justice Day delivered the opinion of the Court.

This is a writ of error to the Court of Appeals of the District of Columbia to reverse a judgment of that court affirming a judgment of the Supreme Court of the District of Columbia in favor of the defendant in error, overruling a demurrer to the defendant's second plea.

The action was brought on the law side in the Supreme Court of the District of Columbia on December 1, 1903, to recover judgment against Karrick, defendant in error, upon a judgment rendered in the Superior Court for the county of Suffolk, Commonwealth of Massachusetts, on November 20, 1900. Copy of the record in the Massachusetts court is made part of the record in the Supreme Court of the District of Columbia.

This record shows that suit was brought upon certain contracts between the defendant in error and one Charles H. Wetmore, since deceased, plaintiff's intestate. The defendant was personally served with process, appeared and pleaded to the declaration. Trial was had to a jury, and resulted in a verdict against the defendant. Upon his motion the verdict was set aside. Thereupon the plaintiff filed an amendment to his declaration and another trial to a jury was had. Upon February 21, 1894, by another verdict, special and general, a sum of $9,169.39 was found in favor of the plaintiff. Motion for a new trial was made by the defendant and overruled March 3, 1894, and exceptions filed. On June 8, 1897, more than three years after the proceedings just recited, the action was dismissed under the general order of the court upon the calling of the docket. Two days thereafter, June 10, 1897, the order of dismissal was stricken out and the case restored to the docket.

On June 23, 1897, attorney for the defendant entered an order withdrawing his appearance. On June 13, 1898, an attorney, whose name does not appear elsewhere in the record, withdrew his appearance. The record then shows:

"Thence the case was continued to the July sitting, 1898, when said exceptions having been presented to the court were disallowed as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the questions of law raised by the defendant's exceptions."

Then follows:

"Thence the case was continued from sitting to sitting into the April sitting, 1899, when on the 12th day of June, 1899, at a calling of the docket under the general order of court, said action was dismissed."

And then the entry:

"And now at this present October sitting, 1900, to wit, on the 18th day of said October, 1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered."

On November 17, 1900, there was a motion by plaintiff for judgment on the verdict of the jury, and on November 20, 1900, judgment was entered accordingly against the defendant for the sum of $12,881.46 and costs.

Two pleas were filed to the declaration in the Supreme Court of the District of Columbia, first, the general issue *nul tiel record;* second, a special plea, wherein the defendant set out that on June 12, 1899, the cause against him in the Massachusetts court was dismissed; that under the rules of court that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms or sitings of the court, and until October 18, 1900; that, in the meantime, on April 29, 1899, defendant filed his petition in bankruptcy in the District Court of the United States for the District of Colorado, enumerating in his schedule the debt due to said Wetmore, and was, by the said District Court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, including the debt sued on; that subsequently to the discharge, as aforesaid, he made inquiry of the clerk of the court in Massachusetts as to the suit, and was informed that said suit was no longer pending; that relying upon this statement he took no steps to suggest in that court his discharge in bankruptcy; that the action of the court in Massachusetts, restoring the case to the docket, was without summons, citation or notice of any kind to him, or to any one for him, and without his knowledge; that the court had no jurisdiction to render the judgment sued upon.

Issue was joined upon the first plea and to the second plea a demurrer was filed, which was sustained by the Supreme Court of the District of Columbia. From the order sustaining the demurrer special appeal was taken on January 6, 1905, to the Court of Appeals for the District of

Columbia, and on April 17, 1905, the judgment below was reversed and the cause remanded. 25 App. D. C. 415.

On May 16, 1905, the Supreme Court of the District of Columbia entered an order overruling plaintiff's demurrer to defendant's second plea and, the plaintiff electing to stand on his demurrer, judgment was entered for the defendant, and the plaintiff appealed to the Court of Appeals of the District of Columbia.

On October 10, 1905, the case was submitted; and, on the 12th day of the same month, judgment below was affirmed without further opinion.

Before taking up the case in detail it must be regarded as settled by previous decisions of this court that where an action is brought to recover upon a judgment the jurisdiction of the court rendering the judgment is open to inquiry. And the constitutional requirement as to full faith and credit in each State to the public acts, records and judicial proceedings of every other State does not require them to be enforced if they are rendered without jurisdiction, or otherwise wanting in due process of law. This principle was so lately asserted by a decision in this court as to render unnecessary more than a reference to the consideration of the subject in *Fort Wayne Mutual Life Association of Indianapolis, Indiana*, v. *McDonough et al.*, decided on January 7, 1907, of the present term. (204 U. S. 8.)

It is also an elementary doctrine of this court that a judgment rendered *in personam* against a defendant without jurisdiction of his person is not only erroneous but void. *Pennoyer* v. *Neff*, 95 U. S. 714. And the same case holds that such judgment is not required to be enforced in another State either by the due faith and credit clause of the Constitution or the act of Congress (Rev. Stat. § 905) passed in aid thereof.

It is apparent from the statement of facts preceding this discussion that the precise question to be determined is whether a court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, may at any time after the term, and at a subsequent term, no matter how remote from the time of rendering judgment, without motion or proceeding to vacate the judgment, and without notice, set aside the judgment so rendered and render a new judgment against the defendant for the recovery of a sum of money against him.

The general principle is that judgments cannot be disturbed after the term at which they are rendered and can only be corrected, if at all, by writ of error or appeal, or relieved against in equity in certain cases. There are, it is true, certain exceptions to the rule within which, it is the contention of the plaintiff in error, the present action is brought.

No contention is made in the brief or oral argument of counsel for plaintiff in error that the question for decision in this case is changed or modified because of the fact that terms of court are abolished by statute in Massachusetts. The statutes of that Commonwealth, Rev. Laws, v. 2, 1382, § 24, provide for "sittings" of the Superior Court at Boston, in the county of Suffolk for civil business, on the first Tuesdays of January, April, July and October. The exemplified copy of the record in this case shows that the case was dismissed under the general order of the court at the April sitting, 1899, on the 12th day of June, 1899. At the October sitting, 1900, to wit, on October 18, 1900, the dismissal was stricken off for the reason stated, and on November 12, 1900, the new judgment was rendered.

In *Dalton-Ingersoll Company* v. *Andrew J. Fiske*, 175 Mass. 15, the Supreme Judicial Court recited the previous cases, holding that terms no longer exist in the Superior Court, and said (p. 22): "When we had terms the practice was to enter judgment, either on the same day in the term upon motion, or, of course, on the last day. Howe, Pract. 267. Since terms have been abolished the practice is regulated by statutes and the rules of court." In the second plea it is averred, and admitted by the demurrer, that under the rules of court the dismissal became final on the first Monday of July, 1899; that is, the first Monday of the following month.

We think this rule day equivalent to the end of a term. It is the time at which, by the rules of court adopted under statutory power, the judgment became final, unless set aside for mistake within the principles to be hereinafter discussed.

*Pierce* v. *Lamper*, 141 Mass. 20, was a case where a suit had been dismissed upon the call of the docket under the same rule under which the case against Karrick, defendant in error, was dismissed for want of action within the year, which order should have been followed by an entry of judgment of dismissal, in place of which the clerk simply made a docket entry "dismissed on call." The court held, since it was the duty of the clerk to have entered the dismissal, it was to be deemed in law as actually entered and a final disposition of the case; that at a subsequent term the court had no power to vacate it, except by writ of review filed within one year under the statute.

The doctrine that a judgment is final at the term unless set aside within the exceptions for mistake seems fully recognized by other decisions in Massachusetts. *Radclyffe* v. *Barton*, 154 Mass. 159, where previous cases are cited in the opinion.

At common law a writ of error *coram vobis* brought before the court certain mistakes of fact not put in issue or passed upon, such as the death of

a party, coverture, infancy, error in process or mistake of the clerk. This writ is no longer in use, but its objects are attained by motion. *Pickett* v. *Segerwood*, 7 Pet. 145, 147.

As in the common law writ of *coram vobis*, so in the proceeding by motion, after a party has been dismissed from the action by judgment he is brought again into the court by notice of the new proceeding. *Ferris* v. *Douglass*, 20 Wend. 626.

A few of the cases from this court may be noticed which support the general proposition that, at the end of the term at which judgment was rendered, the court loses jurisdiction of the cause. The principle was briefly stated by Mr. Chief Justice Waite, speaking for the court, in *Brooks* v. *Railroad Co.*, 102 U. S. 107:

"At the end of the term the parties are discharged from further attendance on all cases decided and we have no power to bring them back. After that, we can do no more than correct any clerical errors that may be found in the record of what we have done."

The question underwent a full discussion, Mr. Justice Miller delivering the opinion of the court, in *Bronson* v. *Schulten*, 104 U. S. 410. On page 415, said:

"But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks* v. *Railroad Company*, 102 U. S. 107; *Public Schools* v. *Walker*, 9 Wall. 603; *Brown* v. *Aspden*, 14 How. 25; *Cameron* v. *McRoberts*, 3 Wheat. 591, *Sibbald* v. *United States*, 12 Pet. 488; *United States* v. *The Brig Glamorgan*, 2 Curt. C. C. 236; *Bradford* v. *Patterson*, 1 A. K. Marsh. (Ky.) 464; *Ballard* v. *Davis*, 3 J. J. Marsh. (Ky.) 656."

In discussing the exceptions to this rule for the correction of judgment by writ of error *coram vobis*, or motion now substituted for the old practice, the only one which has application here is error in the process through the default of the clerk.

We are unable to find in the present record any clerical mistake. The entry of action during the year upon the bill of exceptions appears to have been duly entered upon the minutes of the court; the clerk made no mistake about it. The court erroneously rendered a judgment, believing that no action had been taken, but this was not through mistake or oversight of the clerk within the meaning of the rule. The judgment

intended to be entered by the court was, in fact, entered, through misapprehension it is true; but nothing was left out which the court intended to make a matter of record.

In *Hickman* v. *Fort Scott*, 141 U. S. 415–418, there was a petition to correct by new findings the special findings of fact upon which the court had rendered a judgment at a former term, which findings, it was averred, had been omitted, some unavoidably and others accidentally; but the application was overruled and error was prosecuted to this court, which, speaking through Mr. Justice Harlan, said: "The judgment was the one the court intended to enter, and the facts found were those only which the court intended to find. There is here no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of record. The case, therefore, does not come within the rule that a court, after the expiration of the term, may, by an order *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court. *In re Wight, Petitioner*, 134 U. S. 136, 144; *Fowler* v. *Equitable Trust Company*, (I,) *ante*, 384; *Galloway* v. *McKeithen*, 5 Iredell, (Law) 12; *Hyde* v. *Curling*, 10 Mo. 227."

This case from 10 Missouri was quoted with approbation also in the case of *In re Wight, Petitioner*, 134 U. S. 136, 145, as follows: "A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*, but where the court has omitted to make an order which it might or ought to have made it cannot at a subsequent term be made *nunc pro tunc*."

In the case *In re Wight* this court approved an order of the Circuit Court of the United States putting in the record at a subsequent term an order which was made at a previous term of the court, remanding the case to the District Court. "A clerical error, as its designation imports, is an error of a clerk or subordinate officer in transcribing or entering an official proceeding ordered by another." *Marsh* v. *Nichols, Shepard & Co.*, 128 U. S. 605, 615.

Of another alleged exception to the general rule of finality of judgments, counsel for plaintiff in error says, after conceding the general rule that jurisdiction is lost after the lapse of the term at which judgment is rendered:

"But a well known exception to this general rule is that a judgment of dismissal based upon a mistake or inadvertence, such as appear in this record, can be set aside after the term, and that is the proposition with which this court is concerned in this case. The reason is that jurisdiction is not lost by a dismissal by a mistake. This is one of the exceptions to the general rule that has been recognized in the decisions of this court for nearly a century."

To support this contention the case of *The Palmyra*, 12 Wheat. 1, is relied upon. In that case, which was one in admiralty, the court found there was no final decree in the court below, and, therefore, it was not appealable. The next term of the court a corrected transcript was adduced, showing there had been a final decree which the clerk, through mistake, had failed to include in the record, and the court permitted the filing of a new transcript. Mr. Justice Story, delivering the opinion of the court, said:

"The difference between a new appeal and a reinstatement of the old appeal after a dismissal, from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators. Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice and is according to the known practice of other judicial tribunals in like cases."

It is to be observed, while the learned justice, speaking for the court in that case, affirmed the "power of this court to reinstate any cause dismissed by mistake," the case had been dismissed at the first hearing, as Mr. Justice Story distinctly says, from a "misprision of the clerk," a recognized exception to the general doctrine of conclusiveness of the judgment after the term, and there is no indication that the correction made in that case was made without notice to the party interested. The adverse party was present and resisted the order, so there was opportunity to be heard.

*The Palmyra* case has been cited a number of times since in the course of opinions not involving the precise proposition, to the effect that the court "may reinstate a cause at a subsequent term, dismissed by mistake." *Ex parte Sibbald* v. *United States*, 12 Pet. 492.

It was cited to the proposition that a court might correct misprision of clerks. *Bank of the United States* v. *Moss*, 6 How. 38.

In 21 How. 85, *Rice* v. *Railroad Company*, an opinion delivered by Mr. Chief Justice Taney, it was held that at common law, where a case upon error proceedings had been dismissed for want of jurisdiction, it could not be reinstated at a subsequent term upon a showing that the final judgment below, for want of which the case was dismissed, had been accidentally omitted from the record, as a production of the correct record showed.

In that case *The Palmyra* case was relied upon in support of the motion, but the court declined to follow it in a common law case and limited its application to the jurisdiction of an appellate court in admiralty cases,

which the Chief Justice said was much wider than in a case at common law.

In the case of *Alviso* v. *United States*, 6 Wall. 458, a case dismissed for want of citation at a former term, omitted to be returned from neglect of the clerk, was reinstated upon the authority of *The Palmyra*; but in that case Mr. Justice Nelson, speaking for the court, distinctly stated that the omission in *The Palmyra* case was the error of the clerk in making out the transcript, and there is no reference to the general authority of the court to reinstate a case dismissed by mistake, regardless of the character of the omission or error.

*The Palmyra*, like every other case, must be read in the light of the point decided in the case, and in considering the language of Mr. Justice Story, who spoke of the general power of the court to reinstate a case dismissed by mistake, it is evident that he had in mind, for he says so, that the first dismissal was for a clerical mistake, which is a well-recognized ground for correcting judgments at subsequent terms, upon notice and proper showing.

The plaintiff in error also cites *Phillips* v. *Negley*, 117 U. S. 665. That case contains an emphatic statement of the doctrine that a judgment at law cannot be reversed or annulled after the close of the term at which it was entered by the court rendering the judgment, for errors of fact or law, with the exceptions which we have heretofore noted. In that case Negley had been sued in the Supreme Court of the District of Columbia upon a certain order. Negley answered, denying his liability, and asserting that he signed the order only as agent; denied also that plaintiff was the holder of the order, or notice of non-payment. After issue joined on the pleas, on April 3, 1879, Negley not appearing, a jury was called, and verdict found for the plaintiff, upon which judgment was rendered.

On September 4, 1882, Negley filed his motion to vacate the judgment and set aside the verdict rendered against him *ex parte*, because of irregularity, fraud and deceit and the negligence of his attorney. Affidavits were filed in support of this motion, setting forth a denial of Negley's personal liability on the order; that he was served with process when temporarily in Washington, being then and since a resident of Pittsburg; that he employed counsel and filed his defense, but received no further notice from the fall of 1874 until July 26, 1882, when he was sued on the judgment in Allegheny County, Pennsylvania; that plaintiff took no notice of the plea filed in the original case until May 3, 1877; that in the meantime, without defendant's knowledge, his counsel had removed from Washington, leaving him without counsel, as plaintiff and his counsel well knew, and on April 3, 1879, without notice, and while Negley was ignorant

of the proceeding, called for a jury and procured the verdict and judgment against him.

Other testimony was taken, and after hearing on December 2, 1882, the Supreme Court of the District set aside the verdict because of "irregularity, surprise, fraud and deceit," and granted a new trial. In this court the judgment of the Supreme Court was reversed for error in entertaining and granting the motion to set aside the judgment, and the cause was remanded, without prejudice to Negley's right to file a bill in equity. After citing and quoting from the *Bronson* case, 104 U. S. *supra*, Mr. Justice Matthews, who delivered the opinion of the court, said:

"Although the opinion [*Bronson* case] also shows that upon the facts of that case the action of the Circuit Court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram vobis*, or for the purpose of correcting the record according to the fact where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous decisions in this court, in the point which has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court. 'No principle is better settled,' it was said in *Sibbald* v. *The United States*, 12 Pet. 488, 492, 'or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Bank of Wistar*, 3 Pet. 431; or to reinstate a cause dismissed by mistake, *The Palmyra*, 12 Wheat. 1; from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, cases in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion.'"

The case just cited is relied upon because of its reference to *The Palmyra*. But the point to which that case is cited was not involved. As we have seen, it had already been limited in *Rice* v. *Railroad Company*, 21 How. 85, to appeals in admiralty. Further, that case, as we have seen, was one of clerical mistake in making up the record.

We therefore find nothing in the previous decisions of this court justifying the contention of the plaintiff in error as to the right to correct the judgment of the previous term, in view of the character of the error sought to be corrected, and more especially in the attempt, under the circumstances shown in this record, to set aside a judgment of a former term and render a new and different judgment without notice to the party who had been dismissed by a former judgment.

As we have seen, the question here involved pertains to a case where no notice is given and a new and different judgment is entered at a subsequent term. It is urged when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the rule that jurisdiction once lost can only be regained by some proper notice, the case at bar is an illustration that such action may impair the substantial right of a party to be heard against the rendition of a new judgment against him. Had notice been given the defendant could have availed himself of his right to plead his discharge in bankruptcy by proper proceedings for that purpose. *Loveland*, Bankruptcy, 783. It may be that he did not lose all right to avail himself of the discharge in some other manner, but he had the right to show that in view of his discharge the judgment in question ought not to be rendered against him.

In *Capen* v. *Stoughton*, 16 Gray, 364, cited by plaintiff in error, a sheriff's jury in condemnation proceedings by mistake signed a verdict in favor of the municipal corporation instead of the property owners. The court held this a mistake of a merely formal and clerical kind; and "when no action has been taken on an order or judgment, and the rights of parties to the proceeding or those of third persons cannot be affected unjustly by the correction of an error, the court has power to order an action to be brought forward and a judgment to be vacated in order that an entry may be made in conformity to the truth."

There is no suggestion that such action can be "brought forward" without notice to the adverse party, or a correction made where, as in the present case, the party has lost a valuable right in reliance upon a judgment of dismissal.

And if it be held that the mistake in this case, though not of the clerk, was of a clerical character, and within the rule permitting the correction of such mistakes by the court, a point unnecessary to decide in this case, such correction cannot be made after term without notice, certainly where the changed condition of the parties in view of a new right acquired would render it prejudicial to render a new judgment.

The appellant also relies upon the proposition that the Massachusetts statute, Revised Laws of Massachusetts, chap. 193, sec. 22, provides that if a judgment is rendered in the absence of the petitioner and without his knowledge a writ of review may be granted upon petition filed within one year after the petitioner first had notice of the judgment; otherwise within one year after the judgment was rendered. But we cannot agree that this remedy supplies the want of jurisdiction in the Massachusetts

court to render, after the term and without notice, a new and different judgment against the defendant in error. Whatever his remedy may be in the State courts, want of jurisdiction may be pleaded wherever the judgment is set up against him in another forum.

We find nothing in any decision of this court which sanctions any different procedure, and the cases in the State courts which hold that notice is necessary after the term before a judgment can be set aside are numerous. Some of them will be found in the note in the margin.*

To sanction a proceeding, rendering a new judgment without notice at a subsequent term, and hold that it is a judgment rendered with jurisdiction, and binding when set up elsewhere, would be to violate the fundamental principles of due process of law as we understand them, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears and condemns only after a party has had an opportunity to present his defense. By the amendment and new judgment the proceedings are given an effect against the defendant in error which they did not have when he was discharged from them by the judgment of dismissal. By the judgment of dismissal the court lost jurisdiction of the cause and of the person of the defendant. A new judgment *in personam* could not be rendered against the defendant until by voluntary appearance or due service of process the court had again acquired jurisdiction over him. As a matter of common right, before such action could be taken he should have an opportunity to be heard and present objections to the rendition of a new judgment, if such existed.

We find no error in the judgment of the Court of Appeals overruling the demurrer to the second plea, and the same is

*Affirmed.*

Mr. Justice BREWER took no part in this case.

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* Murphy *v.* Farr, 6 Halstead (N. J.) 220; Martin et al. *v.* Bank of State, 20 Ark. 336; De Witt et al. *v.* Monroe & Brother, 20 Texas, 289; Berthold *v.* Fox, 21 Minn. 51; Cobb *v.* Wood, 1 Hawkes (N. C.) 95; Hill *v.* Hoover, 5 Wis. 386; Perkins et al. *v.* Hayward, 132 Ind. 95, 100; Bryant *v.* Vix, 83 Ill. 1, 15; Keeney *v.* Lyons 21 Iowa, 277; Weed *v.* Weed, 25 Conn. 337; Fischchessar *v.* Thompson, 45 Ga. 459, 467.

True copy.

Test:

*Clerk Supreme Court, U. S.*